

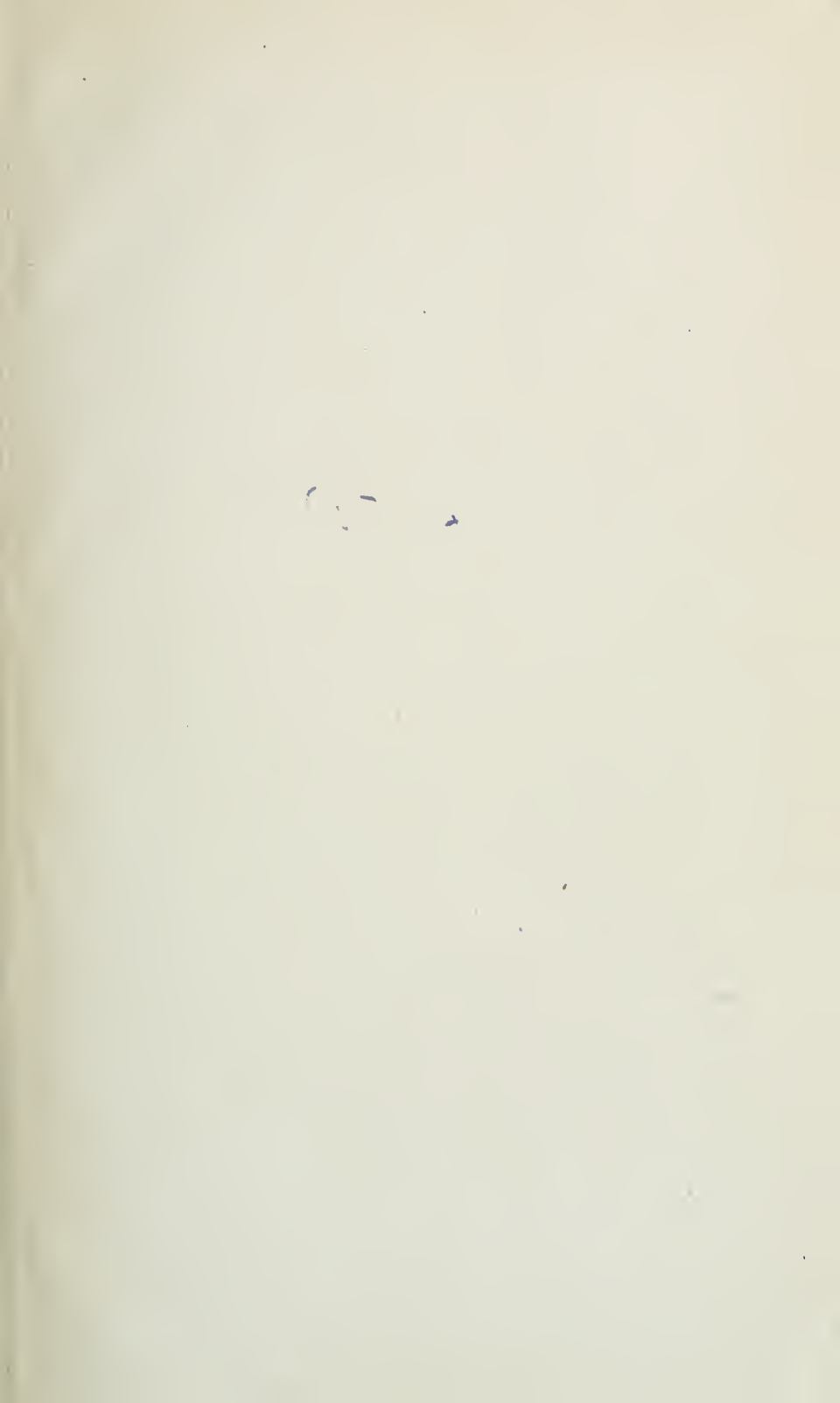
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EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



No. 11471

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PETE GARCIA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

APR 11 1947

PAUL F. O'BRIEN,

CLERK

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NAMES AND ADDRESSES OF ATTORNEYS:

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HOWARD A. LEVINE

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541 South Spring Street
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For Appellee:

JAMES M. CARTER

United States Attorney

ARTHUR LIVINGSTON

WM. P. HAUGHTON

Assistants U. S. Attorney

600 U. S. Post Office and Court House Bldg.
Los Angeles 12, Calif. [1*]

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California, Central Division

February, 1946, Term

No. 18831

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETE GARCIA CERVANTES,

Defendant.

INDICTMENT

[U. S. C., Title 50, App., Sec. 311—Selective Training
and Service Act of 1940]

The grand jury charges:

COUNT ONE

[U. S. C., Title 50, App., Sec. 311]

Defendant Pete Garcia Cervantes, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 199, said board then and there being duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 9, 1942, at Los Angeles, Los Angeles County, California, in the division and district aforesaid; on or about November 9, 1942, and at all times thereafter until on

or about July 14, 1946, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder, in that he did knowingly fail and neglect to report for induction into the armed forces of the United States as so notified and ordered to do. [2]

COUNT TWO

[U. S. C., Title 50, App., Sec. 311]

Defendant Pete Garcia Cervantes, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 199, said board then and there being duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; the defendant, on or about November 9, 1942, in violation of the provisions of said Selective Training and Service Act of 1940, did knowingly and unlawfully evade service in the land or naval forces of the United States of America, in that he did knowingly and unlawfully depart from the United States and go to a foreign country, to wit: the Republic of Mexico, for the purpose of evading service in the land or naval forces of the United States, and did there remain until on or about July 14, 1946.

A True Bill:

CLYDE R. BURDICK

Foreman

JAMES M. CARTER

United States Attorney

[Endorsed]: Filed Aug. 21, 1946. [3]

[Minutes: Tuesday, October 8, 1946]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for further proceedings; Wm. P. Haughton, Assistant U. S. Attorney, appearing as counsel for the Government; Anna Zacsek, attorney, appearing as attorney for the defendant, Pete Garcia Cervantes, who is present in custody; the Court makes a statement and orders that the order made and entered on October 7, 1946, denying the motion of defendant to withdraw his former plea of guilty to count one is vacated, and the sentence of the Court on October 7, 1946, on count one is vacated and set aside; and the former motion of defendant to withdraw plea of guilty to count one is granted, and a plea of not guilty to the said count one is ordered entered for the defendant; and this cause is hereby set for trial on both counts of the Indictment for October 30, 1946, at 10 A. M., and bail of the defendant is hereby fixed in the sum of \$10,000, and the defendant is remanded to the custody of the U. S. Marshal. [4]

DEFENDANT'S PROPOSED OFFER OF PROOF

Jean Cordeau, a witnesses, who had on the 9th day of October, 1946, been duly served with a copy of subpoena and the original thereof shown to him, and the return on said subpoena duly made and filed with the clerk of the court; having failed to appear on the 30th day of October, 1946 as required by said subpoena; and it further appearing that the bailiff of the court having telephoned to San Diego at the instance and request of the defendants to inquire as to said Jean Cordeau, and said bailiff having advised defendants that Jean Cordeau was sick in bed; now therefore the defendants deem-

ing him a material witness, since he would, if called on the stand on their behalf would testify as follows:

That he is a member of the Selective Service Board in National City, No. 168. That he has been such during its existence, and now is. That he has acted as a liaison officer between the two countries, the United States of America and Mexico for approximately twenty five years last past, on behalf of Mexican Nationals.

That he heard of Pete Cervantes through mutual friends during the month of April, 1945. That he became interested in their problem, to wit, of wishing to enter this country for the purposes of being inducted into the United States Army. That pursuant to this advisement, he went to Tiajuana and did there talk to Pete Cervantes. That this conversation took place in the shoe-shop operated by Pete Cervantes, during the month of April, 1946, and only he and Pete Cervantes were present.

That Pete told him that he had tried to enter the armed forces ever since he had left with his uncle. That the uncle had told him he couldn't return to the [11] United States because he had no papers. That the uncle had died a few months after the return to Mexico. That they came to Tia Juana to try to reenter the United States for the purpose of entering the army. That he had gone to all the offices of the legal advisers in Tiajuana, and to the America Consul. That at each place and at every turn he had been told in substance he could not get back, and the army would not take him.

That in substance Jean Corteau told him then and there that the army would take him, as they took delinquents; that he would undertake to help him to this end. That he they began to write to the California Selective

Service Board head at Sacramento relative to this problem of the Mexican National.

That he also told Pete that if Pete belonged to his board, he would take him into the army at once. But that he had no power to do so because Pete belonged to board 199.

That thereafter on occasions too numerous to mention but on the whole approximately twice a month, or oftener, he visited Pete in Tiajuana. That those visits were for the purpose of effecting the acceptance of Pete into the army and of entering the United States for this purpose.

That pursuant to this plan and these visits, he wrote certain letters on the stationary of the Selective Service Board to local board 199 and to Col. Leitch in Sacramento, which letters are marked defendants' exhibits for identification No. "E", and people's exhibits "11", "12". That in addition thereto he advised Peter to write letters and to whom, and what in substance to state, which is people's No. 13 for exhibit.

That defendant makes these following exhibits for identification as a part of his offer of proof, "E", "1", "J". And defendants incorporate said letters in his offer of proof.

That all of said allegations are material to defendant's case, in this that it negatives the specific intent of evading [12] service in the armed forces of the United States, and in particular service in the army.

That it is *coorobative* of defendant's testimony, Pete Cervante's in particular, and further it is a chain in the evidence showing the state of the defendant's mind.

[Endorsed]: Filed Oct. 31, 1946. [13]

[Title of District Court and Cause]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Pete Garcia Cervantes,

Guilty as charged in count one of the Indictment, and

Guilty as charged in count two of the Indictment.

Dated: Los Angeles, California, October 31, 1946.

FOREST W. MONROE

Foreman

[Endorsed]: Filed Oct. 31, 1946. [14]

District Court of the United States

Southern District of California, Central Division

No. 18831

Criminal Indictment in Two Counts for Violation of

U. S. C., Title 50, App., Sec. 311

UNITED STATES

v.

PETE GARCIA CERVANTES

JUDGMENT AND COMMITMENT

On this 31st day of October, 1946, came the United States Attorney, and the defendant Pete Garcia Cervantes appearing in proper person, and by his attorneys, Anna Zacsek and Howard Levine; and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: Count one: * * * did

knowingly fail and neglect to report for induction into the armed forces of the United States as so notified and ordered to do; and Count two: * * * did knowingly and unlawfully depart from the United States and go to a foreign country, to wit: the Republic of Mexico, for the purpose of evading service in the land or naval forces of the United States, and did there remain until on or about July 14, 1946;—as more fully set forth in the Indictment; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years in a penitentiary on each of the two counts of the Indictment, said periods to begin and run concurrently;

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) BEN HARRISON

United States District Judge

A True Copy. Certified this 31st day of October, A. D. 1946.

(Signed) EDMUND L. SMITH

Clerk

(By) Murray E. Wire

Deputy Clerk

[Endorsed]: Filed Oct. 31, 1946. [15]

[Title of District Court and Cause]

[DEFENDANT'S REQUESTED INSTRUCTIONS]

Defendant's Instruction No. 1

A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of all the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Penal Code 1096.

Covered by other instructions. Ben Harrison, J. [16]

Defendant's Instruction No. 2

You are instructed that in every crime or public offense, there must exist a union, or joint operation of act and intent, or criminal negligence. There is no criminal liability where the act is committed, through misfortune or accident, with no intent or negligence. If you believe from all the evidence that Pedro Garcia Cervantes and Salvador Garcia Cervantes committed the acts charged

with no intent or criminal negligence, then you should bring in a verdict of *acquittal* for the defendants.

Penal Code 20

Penal Code 26(6)

Covered by other instructions; refused. Ben Harrison, J. [17]

Defendant's Instruction No. 4

You are instructed that diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice-consuls, and consular agents of foreign countries, and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, are not required to be registered under Sect. 2 (Sect. 302) of the Selective Training and Service Act, and are relieved from liability for training and service under Section 3(b) (Section 303) of said act.

U. S. C. A., Tit. 50, App., Sect. 305(a).

No. Refused. Not applicable and incomplete. Ben Harrison, J. [18]

Defendant's Instruction No. 5

You are instructed that every alien between the ages of 21 and 36 who lives or has a place of residence or abode in the United States, temporary, or otherwise, or for whatever purposes taken or established, is required

to present himself for and submit to registration unless such alien falls within one of the specific classes exempted from such registration by Section 5(a) of the Selective Training and Service Act of 1940.

39 Op. A. G., October 11, 1940.

Refused. Not applicable as no evidence alien comes within exemptions. Ben Harrison, J. [19]

Defendant's Instruction No. 6

You are instructed that the rules and regulations made by the director of the Selective Training and Service Act of 1940 do not provide any norm or standard by which the local board can determine whether or not a person is in one of the "other Categories" mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Sect. 305, nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not residing in the United States, as that term is used in Sections 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

Ex Parte Asit Ranjan Ghosh, 50 F. Supp. 851.

No. Refused. Ben Harrison, J. [20]

Defendant's Instruction No. 7

You are instructed that a male alien who is now in or hereafter enters the United States, who has not declared his intention to become a citizen of the United States, is not a "a male person residing in the United States", with-

in the mean of Section 2 or Section 3 of the Selective Training and Service Act of 1940 as amended.

Sect. 611.13, Selective Service Regulations.

No. Refused. Ben Harrison, J. [21]

Defendant's Instruction No. 8

You are further instructed that due process has been denied where there is no rule promulgated in the regulations whereby any standards are established for any person who is subject to the Selective Training and Service Act to determine whether or not he is or is not entitled to a certificate of nonresidence.

Ex Parte Asit Ranjan Ghosh, 58 F. Supp. 851.

No. Refused. Ben Harrison, J. [22]

Defendant's Instruction No. 9

You are instructed that by treaty dated January 22, 1943, between the United States of America and the Government of Mexico, the nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence.

Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter, and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in

its forces. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objections desired.

57 U. S. Statutes at Large, 78th Congress, 1st Session, 1943.

No. Refused. Ben Harrison, J. [23]

Defendant's Requested Instruction No. 12

Selective Service Act Regulations.

633.91. Induction and Subsequent Classification of Co-Belligerent Aliens

(a) At any time prior to his induction into the land or naval forces of the United States, a registrant who is not a citizen of the United States and who has not declared his intention to become a citizen of the United States but who is a citizen or subject of a cobelligerent nation may request and be permitted to be inducted into the armed forces of such cobelligerent nation, provided an agreement has been entered into between the United States Government and the government of such cobelligerent nation, the terms of which permit such induction and give to citizens or subjects of the United States residing in such cobelligerent nation a reciprocal right to serve in the land or naval forces of the United States.

(b) The manner in which, the time when, and the place where a request may be made by such registrant to be inducted into the armed forces of the cobelligerent

nation of which he is a citizen or subject shall be prescribed by the Director of Selective Service.

(c) When such registrant files a request for induction into the armed forces of the cobelligerent nation of which he is a citizen or subject and *files* to report for or be inducted into the armed forces of such cobelligerent nation, he shall, if acceptable, be inducted into the armed forces of the United States when his order number is reached.

(d) When it has been determined that any registrant has been inducted into the armed forces of a cobelligerent nation in the manner in this section provided, his classification shall be reopened and he shall be placed in Class 1-G.

Covered by other instructions. Ben Harrison, J. [24]

Defendant's Instruction No. 15

If a delinquent reports or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted or assigned to work of national importance, as the case may be, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of

Justice that the registrant is delinquent because he has failed to respond to an Order to report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to work of national importance, and the local board to which the registrant has reported or before which he has been brought shall prepare such papers as may be necessary in order to effect such induction or assignment and forward copies thereof to the registrant's own local board. The induction or assignment of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for delivery to the local board from which such registrant was inducted or assigned. [25]

(c) If the registrant's own local board advises that an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) has not been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared or has been brought of the action to be taken with reference to such registrant.

642.21 Selective Service Act Regulations.

Refused. Not applicable. Ben Harrison, J. [26]

[Endorsed]: Filed Oct. 31, 1946. [27]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Honorable James M. Carter, United States Attorney, and to the Honorable William P. Haughton; and to the Clerk of the Above Named Court.

You and Each of You Will Please Take Notice that defendant above named gives notice of appeal as follows:

I.

That the name and address of appellant is, Pete Garcia Cervantes, and he is now in custody, at the Los Angeles County Jail, Hall of Justice, Los Angeles, California.

II.

That the name and address of appellant's attorneys are, Anna Zacsek, at 1488 Sunset Boulevard, Los Angeles 26, California, and Howard A. Levine, at 1007 Spring Arcade Building, 541 South Spring Street, Los Angeles 13, California.

III.

Offense, Violation U. S. C., Title 50, App., Sec. 311; Count One. Defendant did knowingly fail and neglect to report for induction into the armed forces of the United States as [28] more fully set forth in court one of the Indictment.

County Two: That defendant did knowingly and unlawfully depart from the United States and go to a Foreign Country—Republic of Mexico, for the purpose of evading service in the land or naval forces of the

United States, and did there remain until on or about July 14, 1946, as more fully set forth in count two of said Indictment.

IV.

Date of Judgment. October 31st, 1946.

V.

Concise Statement of Judgment and Sentence. Judgment on order, defendant having been found guilty of said offenses is hereby committed to the custody of the attorney General, or his authorized representative for the period of two years in a penitentiary on each of the two counts of the Indictment, said periods to begin and run concurrently.

VI.

Name of Institution Where Defendant Now Confined.
Los Angeles County Jail.

VII.

The above named defendant, appellant herein, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the above stated Judgment.

Dated this 7th day of November, 1946.

ANNA ZACSEK and
HOWARD A. LEVINE

By Anna Zacsek

Attorneys for Appellant

[Endorsed]: Filed Nov. 8, 1946. [29]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33 inclusive contain full, true and correct copies of Indictment; Minute Orders Entered October 8, 1946 and October 31, 1946; Subpoena to Jean Corteau, Sr. with return thereon; Defendant's Proposed Offer of Proof; Verdict; Judgment and Commitment; Defendant's Requested Instructions; Notice of Appeal; Order for Transmission of Original Exhibits; Designation of Record on Appeal and Affidavit and Order Extending Time to File Record on Appeal, which, together with copy of Reporter's Transcript in two volumes and original Government's Exhibits 1 to 13 inclusive and Defendant's Exhibits A to K inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$9.85 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of January, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

In the District Court of the United States for the
Southern District of California

Central Division

Honorable Ben Harrison, Judge Presiding

United States of America, Plaintiff, vs. Pete Garcia
Cervantes, Defendant. No. 18,831-Crim.

United States of America, Plaintiff, vs. Salvador Gar-
cia Cervantes, Defendant. No. 18,832-Crim.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Wednesday, October 30, 1946

Appearances:

For the Plaintiff: James M. Carter, Esq., United States
Attorney; by Wm. P. Haughton, Esq., Asst. United States
Attorney.

For the Defendants: Anna Zacsek.

Los Angeles, California, Wednesday, October 30, 1946
10:00 a.m.

The Court: You may proceed.

The Clerk: United States versus Pete Garcia Cer-
vantes, No. 18,831 Criminal, and United States versus
Salvador Garcia Cervantes, No. 18,832 Criminal.

Mr. Haughton: The plaintiff is ready.

Miss Zacsek: The defendants are ready.

May it please this Honorable Court, Mr. Jean Corteau,
our material witness and upon whom the defense is predi-
cated as the most essential witness, was served by me
personally. He was in court, as the court will recall, the
last time this cause was called.

I have filed a return of the subpoena. Mr. Cervantes, Senior, saw him yesterday, and he said he would be here without fail. He has always been here regularly whenever this matter has come up for any reason at all, even on the matter of the plea.

Now, I would respectfully request the court to excuse me or call a recess on this matter long enough for me to telephone San Diego and find out if he left and if so when.

The Court: Counsel, there is a preliminary matter that I want to dispose of first. I have heretofore ordered the consolidation of these two cases for trial. I question now [4*] whether I had that right without the consent of the defendants.

Miss Zacsek: Yes, your Honor.

The Court: And unless the defendants are willing to have the two cases tried together it will be necessary to try them separately.

I would like to know at this time what your attitude and the attitude of the defendants is in that respect.

Miss Zacsek: In my opinion, may it please this honorable court, I feel the cause would be best served by a consolidation. I think since they are both active together and since the facts are identical, I feel that they should be tried. Is that your wish, Mr. Cervantes?

Pete Cervantes: Yes.

Miss Zacsek: And you?

Salvador Cervantes: Yes.

The Court: Let the record show the Government consents to a consolidation.

*Page number appearing at top of page of original Reporter's Transcript.

Mr. Haughton: Yes, your Honor; that is satisfactory to the Government.

The Court: I am willing to take a recess so you may put in a long distance call. Did you serve him with a subpoena?

Miss Zacsek: Yes, your Honor. I have here made the return. May it please the court, I also respectfully move [5] the association of Mr. Howard Lavine with myself as counsel for these defendants and each of them.

The Court: You may take your order.

Why not go ahead and impanel a jury and if your witness is not here then we will take a recess. He may have been delayed a few moments. And if it is necessary to issue a bench warrant we will do that and have the Marshal bring him in even though it is necessary to continue the trial until tomorrow morning.

Miss Zacsek: I am sure the only reason he is delayed is because of some unavoidable circumstance. I know the gentleman's character. I can vouch for his integrity and honor. I know if he said he would be here he will be here if it is humanly possible.

The Court: Well, he may have been delayed a few minutes. Instead of holding up a large number of people it would be better to just hold up the jury. As a matter of fact, I do not see why we cannot proceed with the Government's case and in the meantime give you an opportunity to put in a long distance telephone call and ascertain what the trouble is. Then if it is necessary to take a continuance until tomorrow morning we can do so. That will only inconvenience 12 people instead of 20 or 30.

Miss Zacsek: Thank you. I think that is a very wise suggestion, your Honor. [6]

The Court: With that understanding we will proceed with the impanelling of the jury.

I wish counsel would approach the bench.

(A discussion was had at the bench without the hearing of the jury and reporter.)

(The following proceedings were had within the presence and hearing of the jury:)

Miss Zacsek: If the court will bear with me for just a moment, I will respectfully request a brief recess in order to request someone to telephone for me and ascertain whether or not the witness has yet left San Diego for court.

The Court: Very well.

(Short recess.)

The Court: Are you ready to proceed?

Miss Zacsek: Yes.

(Following an examination by the court of the jury as to its qualifications, the following proceedings were had:)

The Court: Has the Government any additional questions?

Mr. Haughton: None, your Honor.

The Court: Have you any additional questions?

Miss Zacsek: Just one, may it please the court, and that is whether or not by reason of personal relationships with any person who may have been engaged in the armed services of the United States, whether such a relationship would cause a prejudice in the mind of any juror, either for [7] or against the defendants because of this particular charge?

The Court: I think my general question covered that. I asked them if they know of any reason whatsoever they couldn't give these defendants a fair and impartial trial.

Would the fact that some member or members of your families may have been engaged in the Armed Forces of the United States cause you to have any prejudice one way or the other in this case? In other words, do you feel that you can try this case solely upon the evidence as presented to you in this court and upon that evidence alone render a verdict thereon?

Miss Zacsek: There are one or two other questions which Mr. Lavine has suggested that we ask. One is whether or not there are on the panel any veterans of World War I or II, and if so, whether by reason of that fact they might be prejudiced. I know the general questions the court has asked has covered that but this is a specific question.

The Court: Are any of you gentlemen veterans of either World War I or II?

A Juror: Yes.

The Court: Do you feel that that fact would have any bearing upon you arriving at a just verdict in this case?

The Juror: No, sir.

Miss Zacsek: And whether or not any member of the panel is affiliated with or belongs to any veterans' organization? [8]

The Court: I am not going to ask them that. They may belong to any veterans' organization or church that they want to. I do not think that is any of this court's business or your business.

Miss Zacsek: No, it isn't and I am not asking for reasons of curiosity. It is merely because of the one thing, does such an affiliation exist?

The Court: I will not inquire as to the jurors' affiliations.

Miss Zacsek: Thank you, your Honor.

The Court: Do both sides pass for cause?

Mr. Haughton: The Government passes for cause.

Miss Zacsek: Pass for cause.

The Court: Any challenges on the part of the Government?

Mr. Haughton: No, the Government passes.

Miss Zacsek: We accept the jury.

The Court: Both sides satisfied?

Mr. Haughton: Yes, your Honor.

Miss Zacsek: Yes, your Honor.

The Court: The jurors will be sworn.

(Whereupon, the jury was sworn.)

The Court: Counsel, do you desire to have the indictment read?

Miss Zacsek: We waive the reading of the indictments, [9] may it please the court.

The Court: Do you desire to make an opening statement?

Mr. Haughton: A brief one, if the court please.

(Whereupon, an opening statement was made by counsel for the plaintiff.)

The Court: Do you desire to make an opening statement, counsel?

Miss Zacsek: Thank you, your Honor. I would like to also make a brief opening statement, if I may.

(Whereupon, an opening statement was made by counsel for the defendants.)

The Court: I wish to instruct the jury at this time that counsels' statements, as heretofore indicated, are not to be considered by you as evidence. The evidence in the case must come from the witness stand.

May I ask, are there any facts in this case that can be stipulated to?

Miss Zacsek: I think so.

The Court: In view of the opening statement of counsel?

Miss Zacsek: I think so.

The Court: Can it be stipulated they were both registered and registrants of Local Board 199?

Miss Zacsek: Yes, I believe so, may it please the court. I take it, however, this will not preclude the introduction of the questionnaires? [10]

The Court: No; it will not preclude the introduction of anything. I don't know—maybe counsel would prefer to go ahead in the regular way.

Mr. Haughton: Whatever the court thinks. It might be just as easy.

The Court: Can you not by stipulation introduce the registration cards?

Mr. Haughton: That is very satisfactory.

The Court: The questionnaires of each defendant?

Mr. Haughton: Yes, sir.

The Court: And the order to report for induction?

Miss Zacsek: That is right. We can stipulate to that and have them introduced as exhibits, then we can refer to them.

The Court: And that Salvador was ordered to report and those orders will fix the dates.

Mr. Haughton: Yes, your Honor.

The Court: Has counsel examined the exhibits?

Miss Zacsek: Yes. I have excerpts from the exhibits, may it please the court.

The Court: Very well. You may offer the exhibits according to your stipulation. I would suggest that you first introduce the registration card of Salvador Cervantes. Will counsel stipulate it may be admitted without further proof? [11]

Miss Zacsek: So stipulated.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to was marked as Plaintiff's Exhibit 1, and was received in evidence.)

The Court: Then the questionnaire.

Miss Zacsek: So stipulated.

The Court: That is as to Salvador Cervantes?

Miss Zacsek: Yes.

The Clerk: Plaintiff's Exhibit 2.

(The document referred to was marked as Plaintiff's Exhibit 2, and was received in evidence.)

The Court: Is it stipulated both defendants were classified 1-A?

Miss Zacsek: And the dates thereon, may it please the court.

The Court: The questionnaire, I presume, will show the dates?

Miss Zacsek: The questionnaire speaks for itself. The various dates and so forth appear on it.

The Court: Then the order to report for induction.

Mr. Haughton: A copy of the order to report.

Miss Zacsek: I will stipulate it may be received.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(The document referred to was marked as Plaintiff's Exhibit 3, and was received in evidence.) [12]

The Court: And that it was mailed in due course?

Miss Zacsek: So stipulated.

The Court: And will it or will it not be stipulated they did not report at the time and place indicated?

Miss Zacsek: So stipulated.

The Court: Now, with reference to Pete Cervantes. The registration card will be exhibit next in order.

Miss Zacsek: I stipulate it may be introduced into evidence.

The Clerk: Government's Exhibit 4.

Mr. Haughton: The Selective Service questionnaire of Pete Cervantes.

Miss Zacsek: Stipulated that may be introduced into evidence.

The Clerk: Plaintiff's Exhibit 5.

Mr. Haughton: The copy of the order to report for induction.

The Court: The original of which was mailed to the defendant in due course?

Miss Zacsek: Well, I will stipulate it was mailed to the address given by the defendant or to his last known place of residence.

The Court: A member of the Board will testify as to what the records show.

Miss Zacsek: I think the records speak for themselves. [13] I will stipulate that whatever the questionnaire address was—I merely wish to say this, that in the case of both brothers I do not wish to stipulate that they received it; merely that it was sent to an address given by them.

Mr. Haughton: To the last address furnished by them to their board.

Miss Zacsek: Correct, yes.

Mr. Haughton: Have Government's Exhibit 4 and 5 been admitted, your Honor?

The Court: Yes.

(The documents referred to were marked as Plaintiff's Exhibits 4 and 5, and were received in evidence.)

Mr. Haughton: And the order to report for induction will be government's next in order.

The Clerk: Plaintiff's Exhibit 6.

The Court: It may be received.

(The document referred to was marked as Plaintiff's Exhibit No. 6, and was received in evidence.)

Mr. Haughton: We further stipulate that Local Board 199 had jurisdiction of the address each registrant gave at the time of registration.

Miss Zacsek: So stipulated.

The Court: Have you any further instruments, counsel, or letters or copies of letters? [14]

Mr. Haughton: Yes, I do have, if the court please. If we might have a short recess, we might stipulate as to several items that I contemplated putting in evidence in the regular manner.

Miss Zacsek: I think that is a very wise suggestion. I think we can expedite the trial and save considerable time that way.

The Court: I am always a strong believer in saving time. Under those circumstances we will take a recess for a few moments rather than have to go through perhaps a lot of formalities.

The jury is admonished at this time not to discuss this case among yourselves or permit any person to discuss it with you or express or form any opinion until the case has been finally submitted to you.

This admonition is not a mere formality but is a serious one and it is necessary for you to conform to it in order that each party may have a fair trial in this court. And when I say "each party" the government is entitled to a fair trial and so are the defendants.

Will counsel stipulate that that admonition is sufficient and need not be repeated at future recesses?

Miss Zacsek: So stipulated.

Mr. Haughton: Yes, your Honor.

The Court: Very well, we will recess for 15 minutes, [15] ladies and gentlemen.

(Short recess.)

The Court: Will counsel stipulate the jurors are present in the jury box and the defendants are in court with their counsel?

Miss Zacsek: So stipulated.

Mr. Haughton: Stipulated, your Honor.

The Court: What did you accomplish during the recess?

Miss Zacsek: A great deal, I think.

Mr. Haughton: Considerable, I think. I offer in evidence the statement made by Salvador Cervantes to Mr. Skousen, a special agent of the FBI.

Miss Zacsek: So stipulated.

The Court: It may be admitted in evidence.

The Clerk: Plaintiff's Exhibit 7.

(The document referred to was marked as Plaintiff's Exhibit 7, and was received in evidence.)

Miss Zacsek: It may be deemed that all of these exhibits which will be introduced by Mr. Haughton may be introduced into evidence as far as the defendants are concerned.

The Court: You understand the stipulation means that the statements were free and voluntary.

Miss Zacsek: Certainly.

Mr. Haughton: I next offer in evidence a statement signed under oath by Salvador Cervantes. It is in the form [16] of questions and answers before Inspector McFadden of the Immigration and Naturalization Service.

Miss Zacsek: So stipulated.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 8.

(The document referred to was marked as Plaintiff's Exhibit 8, and was received in evidence.)

Mr. Haughton: And is it stipulated in connection with that that this statement was given voluntarily and with the understanding that it might be used in evidence?

Miss Zacsek: So stipulated.

Mr. Haughton: I next offer in evidence a statement given by Pete Cervantes to Mr. a special agent of the FBI and I understand that it is stipulated in connection with this offer that it too was freely and voluntarily given and with the understanding it might be used in evidence.

Miss Zacsek: So stipulated.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 9.

(The document referred to was marked as Plaintiff's Exhibit 9, and was received in evidence.)

Mr. Haughton: I next offer in evidence a certified copy of the statements made in the form of questions and answers by Pete Cervantes to Inspector McFadden of the Immigration and Naturalization Service, and also the stipulation in connection therewith that it was freely and voluntarily given.

Miss Zacsek: So stipulated.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 10.

(The document referred to was marked as Plaintiff's Exhibit 10, and was received in evidence.)

Mr. Haughton: I next offer in evidence a letter that appears in the draft board file of Peter Cervantes, dated November, apparently received or dated November 15, 1945. I cannot tell which. It is addressed to the chairman of the board and written by Eugene Corteau, Sr.

Miss Zacsek: So stipulated.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11.

(The document referred to was marked as Plaintiff's Exhibit 11, and was received in evidence.)

Mr. Haughton: I next offer in evidence as the government's exhibit next in order as one exhibit, a letter from Mr. Corteau—I withdraw the latter part of that. A letter from the defendant Peter Cervantes to Local Board No. 199 in which he encloses a copy of a letter he received from Eugene Corteau, Sr.

Miss Zacsek: So stipulated.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit 12. [18]

Mr. Haughton: I next offer in evidence Government's Exhibit next in order, a letter from defendant Peter Cervantes to Colonel H. K. Leach, of state headquarters of the Selective Service System, dated April 5, 1946, in which there is attached a card of Eugene Corteau, Sr., and a letter of transmittal from the State Director to Local Board 199.

Miss Zacsek: So stipulated.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit 13.

(The document referred to was marked as Plaintiff's Exhibit 13, and was received in evidence.)

Miss Zacsek: I offer as the defendants' exhibit first in order a letter addressed to Pete Cervantes, dated May 10, 1946, signed by the chairman of Local Board 199.

Mr. Haughton: So stipulated. It may be introduced.

The Court: It may be received.

The Clerk: Defendant's Exhibit A.

(The document referred to was marked as Defendant's Exhibit A, and was received in evidence.)

Miss Zacsek: I next offer into evidence an application for a visa, non-quota, from the American Foreign Service at Tijuana on behalf of Pete Cervantes.

Mr. Haughton: No objection. Stipulated that it may be admitted.

The Court: It will be received. [19]

The Clerk: Defendant's Exhibit B.

(The document referred to was marked as Defendant's Exhibit B, and was received in evidence.)

Miss Zacsek: And the same as to Salvador Cervantes from the same consulate in Tijuana.

Mr. Haughton: No objection. Stipulated it may be received.

The Court: It will be admitted.

The Clerk: Defendant's Exhibit C.

(The document referred to was marked as Defendant's Exhibit C, and was received in evidence.)

Miss Zacsek: Offer a birth certificate of Salvador Cervantes.

Mr. Haughton: In that connection, if the court please, it is in Spanish and I do not read Spanish. I am willing to stipulate that Peter Cervantes was born on the date and at the time indicated in his questionnaire and registration card.

Miss Zacsek: Are you willing to stipulate the same as to Salvador?

Mr. Haughton: Yes.

Miss Zacsek: I will withdraw this offer. I next offer into evidence a letter, undated, addressed to the chairman of the local board in Torrance, California, signed by Peter. There is no date or envelope with it. [20]

Mr. Haughton: In that connection I am unable to stipulate to that. It does not appear it was ever presented to the local board and I don't know anything about it.

Miss Zacsek: Then I will offer this for the purpose of identification only at this time.

The Court: It will be marked for identification.

The Clerk: Defendant's Exhibit D for identification.

(The document referred to was marked as Defendant's Exhibit D for identification.)

Miss Zacsek: The next exhibit of the defendants for identification only at this time is a letter dated April 2,

1946, to Peter Cervantes, signed by Eugene Corteau, Sr., of Local Board 168.

The Court: It may be marked for identification.

The Clerk: Defendant's Exhibit E.

(The document referred to was marked as Defendant's Exhibit E for identification.)

Miss Zacsek: I now seek to introduce into evidence a certificate in Spanish, bearing the photographs, both front and profile views, of Pete Cervantes for identification only at this time, purporting to be a statement or an enlistment, voluntary enlistment into the Mexican army.

The Court: It may be marked for identification.

The Clerk: Defendant's Exhibit F for identification. [21]

(The document referred to was marked as Defendant's Exhibit F for identification.)

Miss Zacsek: And the same voluntary registration for the Mexican army as far as Salvador is concerned, which has also on it a front and profile view of the defendant Salvador Cervantes, at this time for identification only.

The Court: It may be so marked.

The Clerk: Defendant's Exhibit G for identification.

(The document referred to was marked as Defendant's Exhibit G for identification.)

Miss Zacsek: And a further booklet of Salvador Cervantes of his military service, for identification only.

The Court: It may be so marked.

The Clerk: Defendant's Exhibit H for identification.

(The document referred to was marked as Defendant's Exhibit H for identification.)

Miss Zacsek: Then a letter, and envelope, one dated July 28, 1946, addressed to myself and signed by Eugene Corteau, on a Selective Service heading and Selective Service envelope, for the purpose of identification only.

The Court: Very well.

The Clerk: Defendant's Exhibit I for identification.

(The document referred to was marked as Defendant's Exhibit I for identification.)

Miss Zacsek: And a letter and envelope on Selective [22] Service System stationery, signed by Eugene Corteau, Sr., and addressed to myself. It is a 1946 letter but I am unable to ascertain the date. I ask it be marked for identification only at this time.

The Court: What is the date?

Miss Zacsek: I can't distinguish it. It is blurred on the envelope. The stamp is smeared and blurred and the letter is without date. Perhaps during the recess, the noon recess, I might obtain a magnifying glass and seek to ascertain the date that way.

The Court: It may be marked for identification.

The Clerk: Marked Defendant's Exhibit J.

(The document referred to was marked as Defendant's Exhibit J for identification.)

The Court: Counsel, as I understand the stipulation of facts, in so far as count 1 is concerned, all the allegations of count 1 as to each defendant have been admitted except the part that the defendant did "knowingly fail and neglected to perform a duty under the act, and that he did

knowingly fail and neglect to report for induction into the armed services." In other words, everything has been admitted under count 1 except that which I just indicated—that is, except the intent and wilfulness.

Miss Zacsek: There is just a question of the date, may it please the court. I am sorry but I did not catch which [23] defendant the court was referring to.

The Court: Both defendants.

Miss Zacsek: Well, you see, the difficulty with that is this, your Honor: The dates—

The Court: But you have admitted that they were registrants of Local Board 199 and the questionnaire shows that they were classified 1-A and that they were given notice to report and that they did not report.

Miss Zacsek: Well, unhappily that is all very well as for Pete, but, it cannot be true of Salvador because, you see, there is a conflict now in the record between the evidence which is shown on the questionnaire of Pete Cervantes and the one shown on Salvador Cervantes. They are in conflict with the indictment.

Mr. Haughton: If the court please, that is a matter of law.

Miss Zacsek: Law? No, no.

Mr. Haughton: What counsel may think is a conflict I suggest perhaps it best be heard without the presence of the jury.

Miss Zacsek: It is not a conflict of law.

The Court: Just a moment. As I understand it, as to Pete Cervantes, all of the allegations of count 1 are admitted except the fact that he knowingly failed and neglected to report or to perform a duty. In other words, the only question [24] involved is intent and wilfulness.

Miss Zacsek: And the knowledge, that is right.

The Court: And as to count 1, as far as Salvador is concerned, under my understanding of the stipulation, all of the allegations of count 1 were stipulated to except knowledge and wilfulness.

Miss Zacsek: Yes. The face of the indictment is what I am talking about. There is a conflict which is in conflict with the stipulated evidence.

The Court: Where is the conflict?

Miss Zacsek: The date.

The Court: Let us see the questionnaire. Does that show a different date or different facts?

Miss Zacsek: Well, the facts show this on the indictment. It shows that on or about October 30, 1942, "he knowingly and unlawfully evaded service by departing from the United States."

The Court: I am not talking about count 2; I am talking about count 1 which says he was ordered to report for induction on October 8th.

Miss Zacsek: 1943. And that he received or he was notified—

The Court: Yes.

Miss Zacsek: But count 2 shows he had left the country a year before that. [25]

The Court: All that is necessary is to mail a notice to his last address and you have stipulated the notice was mailed to his last address.

Miss Zacsek: Yes.

The Court: So that under the law he had notice.

Miss Zacsek: Well, he had constructive notice.

The Court: He had constructive notice and that is all that is required.

Miss Zacsek: But I don't want to stipulate that he had actual notice.

The Court: I am not asking you to, but he was notified according to law.

Miss Zacsek: I will stipulate to that.

The Court: So the only question is—

Miss Zacsek: Knowledge and intent.

The Court: That is right.

Miss Zacsek: That is right.

The Court: It took a long time to get around to that but we finally did.

Miss Zacsek: Well, I am a little bit stupid, your Honor. I am sorry.

Now, about the other two counts—about Count 2.

The Court: Any other exhibits?

Miss Zacsek: No, I think not.

The Court: Counsel, a good many exhibits have been [26] to and I think that Government—counsel for the Government should now read to the jury those exhibits so the jury will know what they contain. Following that, counsel for the defendant may read her exhibits that have been admitted.

Miss Zacsek: May we reserve that until the proper time?

The Court: I think it is proper at this time; but if there is any oral testimony you want to put on so your witnesses may get away, you may do so.

Miss Zacsek: Thank you.

Mr. Haughton: Yes. I have two that I think are anxious to get away and I will accept the court's suggestion. Mr. Kellogg, will you take the stand, please?

STANLEY KELLOGG,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Stanley Kellogg.

Direct Examination

By Mr. Haughton:

Q. What is your occupation, Mr. Kellogg?

A. Probation Officer, United States Probation Officer.

Miss Zacsek: May I interrupt at this point? May it please the court, may I have leave to approach the bench for a moment with counsel? [27]

The Court: Yes.

(A conference was had between the court and counsel without the hearing of the jury.)

(The following proceedings were had in the presence of the jury:)

Q. By Mr. Haughton: Mr. Kellogg, did you have a conversation with Pete Cervantes, the defendant in this case, within the past few months?

A. Yes, I did. In fact I had two or three conversations with him.

Q. Will you state to the best of your recollection when the first conversation took place?

A. I believe it was—

The Court: May I ask is there any objection to leading questions as to conversations so as to confine it to the subject matter?

(Testimony of Stanley Kellogg)

Miss Zacsek: Yes, may it please the court. I think that is a very wise observation on the part of the court. I think the conversations should be limited.

The Court: We only want the conversations, Mr. Kellogg. The Government is interested in any statements that the defendant may have made to you relative to whether or not he was guilty or the extent of his participation in this offense. You will limit it to that.

The Witness: Yes, sir. [28]

The Court: The circumstances under which the statements were made may be brought out by counsel on cross examination.

Miss Zacsek: May it please the court, for the purpose of the record, may it be deemed that the defendants, and each of them, and particularly the defendant Pete Cervantes, objects to the question postulated both by counsel and the court and objects to any answer being given thereto.

The Court: Then, Counsel, I will withdraw my question and direct counsel to proceed to lay the foundation for the time, place, and parties present and what was said.

Miss Zacsek: May it please the court—

The Court: What I am trying to do, counsel, is accomplish that which you asked me to do.

Miss Zacsek: I know you are, your Honor. I simply, for the purpose of the record only, am objecting to the question asked by Mr. Haughton, counsel for the People.

The Court: On what ground?

Miss Zacsek: On the ground it is incompetent, irrelevant and immaterial in view of the exhibits heretofore introduced into evidence.

(Testimony of Stanley Kellogg)

The Court: Well, that does not preclude the Government from introducing additional evidence or additional corroboration. Objection overruled.

Miss Zacsek: Thank you, exception. [29]

Q. By Mr. Haughton: Mr. Kellogg, did the conversation you referred to take place in this building?

A. Yes, they did. They took place in Room 1401 which is our office.

Q. And on the first of such conversations who were present at the time? A. I believe—

Q. Will you just please give the names of those present?

A. Mrs. Anna Zacsek and Pete Cervantes. I don't recall whether his brother Salvador was there or not. I don't believe he was. I am not sure of that point.

Q. Mr. Kellogg, in the course of that conversation did you ask any questions and did the defendant in this case, Pete Cervantes, make any replies to such questions regarding his draft board and whether or not he departed for Mexico, and if so, for what purpose?

A. Yes, he did. I asked him precise, specific questions and he gave me specific, precise answers.

Q. Will you, to the best of your recollection and confining yourself—

The Court: Give us the sum and substance of what he said.

Q. By Mr. Haughton: Please relate what you said and what was said by the defendant? [30]

A. First of all I asked him regarding his family background and general questions pertaining to that and his life in general, which is required in this interview.

(Testimony of Stanley Kellogg)

Q. Never mind what was required, if you please, Mr. Kellogg. And I suggest that that be stricken.

The Court: Well, I don't think it should be stricken but you understand what is wanted. You have been in the courtroom and you understand the nature of the charges?

The Witness: Yes, sir.

Q. By Mr. Haughton: Now, did he discuss with you whether or not he had reported to his Board and why not, and anything about whether or not he had left the country and if so why?

A. He stated to me that approximately October 30th of 1942, he had left the country at the suggestion of his uncle, much against his own will and that he had gone down there more or less realizing that he should not, and after he had gotten to Mexico he stated he felt guilty all the time and realized that he had done wrong. And then I questioned him further regarding that point in several other conversations which followed. One was to the effect that his uncle was more or less acting as a father toward him; but he did state that his uncle had been in Mexico since 1932 and had made several visits to the country, to his home there, and on each of these occasions, he—especially after his marriage in 1942, more [31] or less suggested that he go to Mexico. The boy finally acquiesced and did go there but he stated all the time that he realized he was wrong and he felt guilty because he knew that the United States was really his home; that he had had his children here, had married his wife here and had more or less been raised here—gone to school here. He reached the 9th grade in the Hollenbeck Junior School and had been in clubs and various things and really felt

(Testimony of Stanley Kellogg)

he was more or less an ex-officio citizen of the United States.

I asked him how come when he was supposed to report on November 9th that he suddenly decided to leave on October 30th with only nine days left and his reason was he was influenced by his uncle but felt guilty all the time.

Mr. Haughton: That is all.

Cross Examination

By Miss Zacsek:

Q. Now, Mr. Kellogg, you say that there were other conversations—subsequent ones, is that right?

A. Correct.

Q. Now, there was a subsequent conversation, was there not, in which there was present the defendant, myself and Jean Corteau?

A. Correct.

Q. And at that time it was first brought up in a conversation by Mr. Corteau that both of these young men had [32] volunteered into the Army of Mexico and that in the course of that conversation it was stated by myself, in substance: "Why didn't you say this before?"

A. That is correct.

Q. And in that same conversation, in substance, Pete said that he did not consider that of any use here or in substance words to that effect—he had not considered it of any consequence?

A. That is right.

The Court: Counsel, there has been a lot of talk about their Mexican enlistment. Is it your contention that a person residing in this country and registering under our Selective Service Act, and has been ordered to report, can leave the country and go to Mexico and enlist in the Army and thereby escape service.

(Testimony of Stanley Kellogg)

Miss Zacsek: Certainly.

The Court: The court will hold against you on that and instruct the jury to the contrary.

Miss Zacsek: I respectfully take an exception.

The Court: You have a right to an exception but I just want to clarify the atmosphere a little bit because when he lived in this country, whether he was an alien or not, it was necessary for him to register and when he registered he submitted himself to his Board, and when that Board ordered him to report it was his duty to do so. [33]

Miss Zacsek: May it please this honorable court and for the purpose of the record and for the purpose of the defense, I respectfully take exception to the court's ruling and ask the record to show. And secondly, may the assertion on behalf of the defendants and each of them and for the purpose of the record, that the court's statement to the jury is in direct conflict with the agreement, a copy of which I have here, signed by Padilla and the United States.

The Court: That is the treaty arrangement but there are certain steps that must be taken and must be complied with.

Miss Zacsek: May it please the court, I have not concluded my objection and statement, if I may have that privilege.

The Court: You may have all the privilege you want.

Miss Zacsek: Secondly, I want the record to show my objection to the court's statement to the jury and take exception to it on the ground that it does not accurately state the law or the facts to the jury, as enacted in the

(Testimony of Stanley Kellogg)

Selective Service Act itself, and particularly in the Selective Service Act regulations, more particularly Section 611.

The Court: Please read it.

Miss Zacsek: I am not quite through, your Honor.

The Court: But nevertheless will you read the sections?

Miss Zacsek: But I want to get the subsection, if the [34] court will bear with me for just a moment. It is 611.13 and 611.21. Just a moment, please. I am sorry. I have so many instruments here that I am referring to. Oh, yes—and United States Code Annotated Title 50, Section 305 (a).

For the purpose of my objection that is all I wish to say.

The Court: Will you read those sections?

Miss Zacsek: Yes, your Honor.

(Reading) "A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not 'a male person residing in the United States' within the meaning of Section 2 or Section 3 of the Selective Training and Service Act of 1940, as amended, provided:

"(1) He is a diplomatic representative, a technical attache of a foreign embassy or legation, a consul general, a consul, a vice-consul, or a consular agent of a foreign country."

Does the court wish me to read the entire thing?

The Court: Yes.

Miss Zacsek: Or "(2) He is a full-time official or employee of a foreign government and a national of the

(Testimony of Stanley Kellogg)

country employing him who has been notified to the Department of State; provided that at the time [35] he is notified to the Department of State, a proper representative of his government advises and after investigation the department of State and the Director of Selective Service agree that he is in fact not residing in the United States; or

“(3) The Secretary of State and the Director of Selective Service agree that he is a full-time official or employee of a recognized public international organization, who has entered the United States for the sole purpose of engaging in such employment and has been so engaged continuously since his arrival here, or has at all times during his stay in the United States and prior to his employment by such recognized public international organization been exempt from training and service under the Selective Training and Service Act of 1940, as amended.

“(4) He is a dependant male child under 21 years of age of any person described in subparagraphs (1), (2), or (3) of this paragraph; or

“(5) He is and was at the time of his entry into the United States in the active service of the Armed Forces of a co-belligerent or a neutral country; or

“(6) He is an individual designated or is [36] within a group of individuals described, by the Director of Selective Service as not required to present himself for and submit to registration; or

“(7) He has, within the time prescribed and in the manner provided in Section 611.21, filed with the Local Board with which he is registered, or if he is not regis-

(Testimony of Stanley Kellogg)

tered, with the Local Board having jurisdiction over the area in which he is located, an alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the Local Board of an alien's Certificate of Non-residence (Form 303) which has not expired.

“(b) Each alien in one of the categories described in subparagraphs (1), (2), (3), (4), (5), or (6) of Paragraph (a) must have in his personal possession, at all times, an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration and must exhibit it in the same manner and to the same persons as a registrant is required to exhibit a Registration [37] Certificate (Form 2) under Section 617.1.”

The Court: Now, may I ask is there any of those classifications which these defendants come under?

Miss Zacsek: Sure.

The Court: Which one?

Miss Zacsek: I did not mean to say sure—certainly. Now may I continue?

The Court: Yes.

Miss Zacsek: Just one moment. Section 611.21.

“What aliens may apply for a determination. Any non-declarant alien who has entered or who hereafter enters the United States in a manner prescribed by its laws, except a nondeclarant alien described in subparagraphs (1), (2), (3), (4), (5), and (6) of Section 611.13, may file with his Local Board, if he is registered, or with the

(Testimony of Stanley Kellogg)

Local Board where he is at the time located, if he is not registered, an Alien's application for Determination of residence, (Form 302); provided, that such application is filed within 90 days after the date of his entry into the United States or within 90 days after persons of his age become liable for training and service by law, whichever is the later; and provided further, that such application is filed prior to induction. An Alien's Personal History and Statement (Form 304) [38] must be filed with such application."

Now, just one moment, may it please the court. May I have a moment to confer with counsel?

The Court: There has been a good deal of conferring but I guess a little more will not hurt.

Miss Zacsek: United States Code Annotated, Title 50, 305.

Part of Paragraph 305 (a) reads:

"* * * and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required to be registered under Section 2 and shall be relieved from liability for training and service under Section 3 (b)."

Now, that goes on to say, if it please the court, as follows—no, just a moment. That is all that I wish to quote, may it please the court. I have concluded my quotations.

The Court: The ruling of the court still stands.

Miss Zacsek: May the record, please, show an exception?

(Testimony of Stanley Kellogg)

The Court: Under the new Federal Rules of Procedure, which have been in effect for some time, it is not necessary to take an exception. [39]

Miss Zacsek: Habit is a difficult thing to break, your Honor. I am sorry.

The Court: You may proceed with your cross examination.

Miss Zacsek: Thank you.

Q. Now, at that time it was said, was it not, in substance, by Pete that, yes, he had gone with his uncle to Guadajara and had promptly volunteered for service in the Army there?

A. I don't recall whether he said he had gone promptly or not.

Q. Well, do you recall anything that was said as to dates?

The Court: Well, counsel, the exhibits that you claim you have show the enlistment dates.

Miss Zacsek: Yes, your Honor.

The Court: They speak for themselves in that respect.

Miss Zacsek: Very well.

The Witness: I did say that he had tried to enlist and had signed up and I asked him why he had not brought that up in the first conversation and he didn't give me any answer as to that.

Q. By Miss Zacsek: And do you remember in substance Mr. Corteau saying to you that that was, in his opinion as a member of the Selective Service Board and as a worker between the two countries, that that was of most paramount considera- [40] tion and in his opinion should be made a test case?

(Testimony of Stanley Kellogg)

The Court: Who said that?

Miss Zacsek: Jean Croteau.

The Court: That would be hearsay.

Miss Zacsek: It is part of the same conversation, may it please the court.

The Court: Just a moment. You cannot bring in hearsay. That is what somebody else said. This witness is being questioned as to what the defendant said. I am not going to permit you to get in indirectly something the court has already ruled is inadmissible, unless you can show the defendant received the necessary certificates which exempted him from military service.

Q. By Miss Zacsek: Do you recall, Mr. Kellogg, among other things in discussing his family background and his marriage, that it was stated that he had denied being married to all persons concerned until he finally discussed the matter with the F.B.I. and they brought it up?

A. That is right. In fact he showed me a statement there that he had—a sworn statement, I believe—that he made to the Immigration officers or some official to the effect that he was single.

Q. Do you recall what he said in that connection about that as to any reason?

A. Yes, I do exactly. [41]

Q. Will you tell us?

A. He stated the reason he said he was single was that he at the time hoped to get into the Army and he felt if he said he was single there might be a better chance of getting in.

(Testimony of Stanley Kellogg)

Q. You remember also in that connection that he further stated that he was afraid that if he said he had children and a wife that people would think he wanted to get into the Army just to get the Government allotment to support them?

A. I don't recall that statement, no.

Q. Do you recall that in substance?

A. No, I don't.

Q. Do you recall in substance that he said that he was able to take care of them without Government subsidy or allotment?

A. Yes, he said that. And he also wrote that in a statement that I asked him to make, a written statement, and that he denied his marriage and denied his children so that it would facilitate his getting into the United States Army.

Q. You say he lied about it?

A. Well, he lied about it. In other words, he said he did not have a wife and did not have children.

The Court: That statement was made in the last two or [42] three months?

The Witness: Yes, sir.

Q. By Miss Zacsek: It does not make any sense, of course, but that was the reason he offered it—that it would be easier to get into the Army if he lied about it and said he did not have any family.

A. I believe that is what he said.

Q. Do you remember his stating to you among other things when he felt wrong about his going with his uncle, having been wrong, that he tried ever since that time,

(Testimony of Stanley Kellogg)

from the time he first got into Mexico with the uncle, to return and get into the United States Army?

A. Yes. He said he had tried to contact various people as to some way he could get back up here, but then he said the various individuals told him to forget about it; that he was a Mexican. So he said he more or less did and established himself in his business, the shoe business where he was doing very well and making possibly \$125.00 a week.

Q. That is right; but nevertheless do you remember that in spite of that he was still making efforts and it was through those efforts that Jean Corteau came to see him? Do you remember that? A. No, not exactly.

Q. All right. Will you tell us what you remember was said in connection with Jean Corteau contacting him in [43] the spring of 1945?

A. Mr. Corteau, as I understand—I thought he had contacted Mr. Corteau approximately in April or May as he did want to see if he could get in touch with his Draft Board. I believe he had his sister contact them and he thought that maybe Mr. Corteau could make arrangements for him to come back and contact his Draft Board.

Q. And that was in 1945?

A. May of 1945, I believe.

Q. And that he had told Mr. Corteau that he was a single man? A. Yes.

Q. I mean Mr. Corteau was present at this particular conversation? A. Yes.

Q. And in substance Mr. Corteau either acquiesced to the statements or supplemented them in substance, is that correct?

(Testimony of Stanley Kellogg)

A. Mr. Corteau did quite a bit of talking. It was difficult for me to understand him so I am not sure of everything he said.

Q. I mean he merely either supplemented or corroborated what Pete Cervantes said in the matter of questions and answers?

A. Yes, he did—he did that. [44]

Q. Now, in substance and effect then the conversation continued in this wise, that Pete and Mr. Corteau both stated that Mr. Corteau made several—had made several trips to Tia Juana in an effort to help Pete get into the Army as of that time?

A. Yes, he tried very many means to see if Pete couldn't and Pete had written letters himself, apparently, from what he told me.

Q. And that was in April or May of 1945?

A. Right.

The Court: It is now 12:00 o'clock and we will take a recess until 1:30. The jury will bear in mind the admonition of the court heretofore given.

(Whereupon, at 12:00 o'clock noon a recess was had until 1:30 o'clock p.m. of the same day.) [45]

Los Angeles, California, Wednesday, October 30, 1946
1:30 p.m.

The Court: Will you stipulate, gentlemen, the jurors are present in the jury box and the defendants are in court with their counsel?

Miss Zacsek: So stipulated.

Mr. Haughton: So stipulated, your Honor.

(Testimony of Stanley Kellogg)

The Court: You may proceed with your cross examination.

STANLEY KELLOGG,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Resumed)

By Miss Zacsek:

Q. Mr. Kellogg, among other things that were said in this conversation to which you directed your testimony this morning, do you recall a conversation concerning Salvador Cervantes? A. No, I don't.

Q. Would this refresh your recollection if I suggested to you that in substance Pete discussed or told you that his brother Salvador at all times just did whatever he did and tagged along as a matter of course?

A. I don't recall that, no. I am sorry. We were mostly discussing Pete then. There was going to be another [46] case.

Q. I know we were discussing Pete but I was just trying to evoke from you some recollection.

The Court: He answered your question.

Miss Zacsek: Thank you, your Honor.

Q. By Miss Zacsek: Now, do you remember in substance your comment to the effect of what Pete had planned to do? You have already told us he said he tried to get into the Army and what was his plans or why did he come back. He told you in substance that he wanted to

(Testimony of Stanley Kellogg)

get into the Army and that was his purpose in returning here?

A. He stated that he always had a feeling of guilt. He felt that he had done wrong in following his uncle's suggestion and he did want to come back here right or wrong.

Q. I know. That was when you used the term "sort of ex-officio citizen of the United States", is that right?

A. Correct. That is correct.

Q. But he did not use the term "ex-officio"? That was your own interpretation of what he said?

A. Correct.

Q. In other words, what he said in substance was this, that in spite of the fact that he was a Mexican, a Mexican National, a Mexican Citizen and had been sold this idea by his uncle, nevertheless he felt that having grown up in this country that he was really a part of it even if he wasn't? [47]

A. He did not tell me that he had been sold the idea that he was a Mexican citizen or anything by his uncle, but his uncle had come up here several times on visits and that he more or less acquiesced with his uncle to go down just before he was drafted.

Q. But Pete did not use the word "acquiesce"?

A. He gave in to his uncle's desires.

Q. And he did not go into detail with you then, Mr. Kellogg, as to the uncle's conversation relative to the feeling of nationality?

A. No.

Q. Do you remember him saying to you in substance that his uncle's children were still here in the United

(Testimony of Stanley Kellogg)

States but the uncle himself had gone back to Mexico because he felt that was where he belonged?

A. He did not tell me that but you wrote that in a statement that I asked for as to his family history. Yes, I believe they were living in San Diego.

Q. And do you remember his saying in substance to you that it was with the hope of entering the Army that he came back to the United States and surrendered himself?

A. That was the whole tone of his conversation because of the wrong that he felt he had done in giving in to his uncle because he realized he had done wrong all the time. He felt he should have gone into the Army. [48]

Q. Into the United States Army? A. Right.

Q. And that even now he was desirous—

The Court: That is not material, whether he is now or not. That is another question.

Miss Zacsek: Not this moment, but “now” as of the time of the conversation, your Honor—“now” relating to the conversation.

The Court: I think the atmosphere should be cleared as to Count 2. It is alleged that on or about certain dates for the purpose of knowingly and unlawfully evading service in the land and naval forces of the United States that he did knowingly and unlawfully depart from the United States and go to a foreign country.

The moment that he left this country with that intent the crime was complete.

Many a man has committed an offense and then been sorry for it and wished that he could back up, but after he has once committed the offense it is complete.

(Testimony of Stanley Kellogg)

Miss Zacsek: Certainly that is true as a matter of law, but now, may it please the court, since the court has brought this up. I again refer the court's attention to the law I have heretofore been permitted to read into the record and to the court and I wish to amplify that further with something which I touched upon but forgot. [49]

The Court: Counsel, just a moment. I have ruled and when the time comes you can present any requested instructions that you want which I can refuse or give to the jury.

We have taken about twice as long with this case as it should ordinarily take.

I think the court is partially to blame for that but I want to move the case along.

Miss Zacsek: So do I, may it please the court.

The Court: Let us get the evidence.

Miss Zacsek: There is this one thing, since the court brought it up. I respectfully move the court to consider the United States Statutes at Large, No. 57 of the 78th Congress, First Session, of 1943, in which there appears a treaty between the United States and Mexico relative to this subject and which is important in this matter, both as a matter of law and as a matter of fact, and which I think negatives what the court just now expressed as to what constitutes the right or wrong or what is a crime or not a crime in Count 2 of this particular indictment as to each defendant.

The Court: The court has ruled. Proceed.

Miss Zacsek: May I respectfully, before proceeding, just ask this one further question of the court just so that

(Testimony of Stanley Kellogg)

I understand the court? Does the court reject any consideration of this treaty?

The Court: When that question comes up you can submit [50] it in the form of an instruction and I will instruct the jury as to the law. I am ruling now on the admissibility of the evidence.

Miss Zacsek: Thank you.

The Court: The fact that he wanted to come back in 1945 or 1946 and join the Army does not excuse him for evading service.

Miss Zacsek: Not at all, but the treaty between the United States and Mexico is such that were he already in the Army—

The Court: Counsel, just a moment, let us understand each other. When the court rules the court does not want any argument unless it asks for it.

Miss Zacsek: Yes, your Honor.

Q. Mr. Kellogg, at the time that I referred to the conversation between Pete Cervantes, yourself, Mr. Jean Corteau and myself, was there then at that time a discussion or a statement of fact by Pete in substance, in which he said that he had returned to the United States for the sole purpose of endeavoring to get into the Army?

A. I don't recall whether he made that statement just then but it was made to me in a prior conversation, yes.

Q. And that he had come to this country to submit himself also to any possible prosecution which might ensue by surrendering himself? [51]

A. He said he realized that, yes, that he had done wrong and he wanted to come back and right that wrong.

(Testimony of Stanley Kellogg)

Q. Yes. A. After he had been there since 1942.

Q. That is right. He told you too, in substance did he not, that from the time that he first arrived in Mexico that he had discussed with his uncle the fact that it was a mistake and he wanted to go back where he belonged in spite of the fact he was a Mexican?

A. No, he did not state that. I don't remember it.

Q. Do you remember anything along that line at all, at any conversation, Mr. Kellogg?

A. He stated to me that he felt as soon as he left that he was wrong all along and when he got as far as Tia Juana he wanted to turn around and yet he just gave in. I mean he felt he was running away. That is it.

Q. Of course—but what I am trying to get at is this, that he said to you in substance that he even talked to his uncle about getting back and he told him he could not because he had no papers to get back on?

A. I don't recall that.

Q. Well, would you please search your recollection as to any conversation or writing he gave you to that effect, that he had told his uncle and he wanted to go back and that his uncle told him he could not get back because of the fact [52] he had no papers to get back on?

A. Well, he tried that himself. He tried, apparently, to get back but I don't recall when he tried. It seems like he had stayed there about three or four years before he actually made any attempt.

Q. That is what it seems to you. Now, I don't wish you to—

A. Well, the first actual attempt was in May of 1945 when he contacted Mr. Croteau.

(Testimony of Stanley Kellogg)

Q. That is the first time that Mr. Corteau was contacted but before that do you remember a conversation in which I said in substance to you, that he had gone to the American Consulate for papers and had orally been rejected and when I was down there on the other case that at that time I said, "Let us get some proof of that; go in there and get your papers and if they don't give them to you to have a witness to hear him say they are not giving it to you."?

A. Yes, that is right.

Q. To get a rejection in writing?

A. I recall that.

Q. Do you remember then that he had been there repeatedly before that and had been rejected orally?

A. No, I don't remember anything about whether he said how many times he had been there. I know he said he had been there once. [53]

Q. But you remember I told you—

The Court: We are not interested in what you told him. You were counsel for the defendant. That would be hearsay. It is the defendant's evidence that we want. It is the conversation the defendant had with this witness.

Q. By Miss Zacsek: Do you remember anything now that he said about people that he had asked—the American Consul—notaries—that is, the Mexican way to say it. Pete termed them as notaries who have offices in Tia Juana.

A. I remember he said he contacted several people but they stated "You are a Mexican; just forget that now and stay here and attend to your business," which he did.

Q. That is right. And did he tell you why he contacted those people whom he described as notaries?

(Testimony of Stanley Kellogg)

A. Because he felt he was guilty and wanted to come back and try to right a wrong.

Q. That is right. But what was he trying to get back for? Didn't he tell you he wanted to get back so he could get into the Army?

A. He might have mentioned that, yes.

Q. That is the point, Mr. Kellogg, that I am trying to bring out, the fact that he mentioned to you that he wanted to get into the Army and by getting into the Army he could right the wrong?

A. But he didn't want to get into the Army until around [54] 1945. That is the first I recollect is when he actually tried—really tried to get back.

Q. That was the time that he contacted Mr. Couteau but he had tried before that, remember, and when he gave up then he said he went into the shoe business because he could not get papers and they told him to forget it. That was before he went in the shoe business. Do you remember that, Mr. Kellogg?

A. I remember he went into the shoe business, yes.

Q. But you remember that it was before the shoe business that he said he came back to Tia Juana with the intent to try and cross the line to get into the Army?

A. Well, to tell the truth he did not do too much talking at all. I had to actually pump things out of him in my conversation with him alone.

Q. I am talking about the conversation when I was present and when Mr. Couteau was present also.

A. I guess he tried several times but wasn't successful.

The Court: We are not interested in what you guess.

(Testimony of Stanley Kellogg)

The Witness: I don't recall those facts.

Q. By Miss Zacsek: You have no present memory then of those statements, whether or not he said them or did not say them?

A. No, I don't. I am sorry but I just don't. [55]

Q. Well, thank you. After all, it is a lot to remember and it is difficult. Thank you, Mr. Kellogg.

The Court: Any further questions?

Miss Zacsek: Just one moment, may it please the court. Thank you very much, that will be all.

Redirect Examination

By Mr. Haughton:

Q. Mr. Kellogg, did he in substance state to you during any of these interviews that he went to Mexico to evade the draft here?

A. He didn't actually say so in so many words, but he knew and I know that he had.

Miss Zacsek: Move to strike the answer.

The Court: That will be stricken.

The Witness: I discussed it.

Miss Zacsek: May I have a ruling?

The Court: I struck the answer.

The Witness: I stated he went to Mexico just at the time when he knew he was supposed to report to his Draft Board and he went there against his will, more or less realizing he was doing wrong.

Mr. Haughton: That is all.

The Court: That is all. Call your next witness.

Mr. Haughton: Mr. George. [56]

The Court: While waiting for the witness you might read the exhibits. May it be understood that in the written exhibits either party may read any part they feel should be called to the attention of the jury?

Miss Zacsek: So stipulated.

Mr. Haughton: So stipulated.

Miss Zacsek: By the way, your Honor, while we are waiting I would like to introduce a photostatic copy of the treaty into evidence, please.

The Court: It is the law of the United States. It is not a part of the evidence. I think you should pass the registration slip to the jury and if there is no part of the questionnaire you expect to read to the jury I think you should hand that to them also.

Miss Zacsek: May I respectfully suggest that the questionnaire be submitted because I do want to read from it.

The Court: You will have an opportunity to read from it. You may proceed.

Mr. Haughton: Exhibit 4 is the original registration card of Pete Cervantes in which he gives his age as 21 years.

The Court: The card will speak for itself, counsel. Just pass it to the jury.

Mr. Haughton: Government Exhibit 1 is the original registration of Salvador Cervantes. Government's Exhibit No. 2 is the questionnaire of Salvador Cervantes and it shows [57] he was classified 1-A on September 11, 1943, and that notice of such classification was mailed to him on September 15th, 1943.

Government's exhibit No. 3 is a copy of the order to report for induction that was mailed to Salvador. And may it be stipulated at this time that neither Salvador nor Pete reported for induction as ordered?

Miss Zacsek: So stipulated.

Mr. Haughton: Government's Exhibit 5 is the questionnaire of Pete Cervantes. This shows that he was reclassified 1-A on October 19, 1942; that notice of that classification was mailed to him on the same date, October 19th, 1942.

Government's Exhibit 6 is a copy of the order to report for induction that was mailed to Pete Cervantes ordering him to report for induction on November 9, 1942.

Government's Exhibit 7 is the statement which Salvador made to the F.B.I. agent. It is dated Los Angeles, California, June 29, 1946, and reads as follows:

"I, Salvador Garcia Cervantes, make the following voluntary statement to Special Agent W. C. Skousen whom I know to be a member of the Federal Bureau of Investigation. No threats or promises have been made to me and I make the statement of my free will knowing it can be used in a court of law against me.

"I was born December 11, 1923, at LaDarca, [58] Mexico. I came to the United States when I was one year old and lived here continually until 1942.

"On June 30th, 1942, I registered with Local Draft Board 200, which was located at that time in the Roosevelt High School Building, East Los Angeles. My file was transferred to Local Board 199 and a card dated Septem-

(Government's Exhibit No. 7)

ber 15, 1943, was sent to me notifying me that I was in 1-A classification. However, I had left the United States with my brother Pedro, November 30th, 1942, so my parents kept this draft card until I returned. I left the United States with my brother Pedro who had been ordered up for induction and had already received his papers. I knew I was violating the law by going to Mexico and not keeping my draft board advised of my whereabouts. My parents did not know where we were either, so mail from the draft board could not be forwarded to me.

"In November or December, 1945, my brother and I tried to obtain visas to return to the United States. I intended to come back and get into the Army if I could get myself straightened out with the draft board. However, our request for a visa was refused. We therefore came back to the United States without permits. My brother Pedro and I [59] crossed the border at San Ysidro, California, July 14, 1946.

"I know I violated the law in leaving the country without notifying my board as required by the Selective Service and Training Act. I am now willing to serve in the Army or be subject to any decision of the United States Government concerning my case.

"I have read the above statement consisting of two pages. It is a true statement on the facts as I know them."

That is signed "Salvador G. Cervantes".

And it is witnessed by W. Cleon Skousen, Special Agent, F.B.I., Los Angeles.

Government's Exhibit No. 8 is the transcript of a hearing held before the Immigration and Naturalization Service. It is so entitled, "Immigration and Naturalization Service, United States Department of Justice, District No. 16. File No. 1600-31760. It is dated at Los Angeles, July 24, 1946.

The Court: The jury cannot hear you.

Mr. Haughton: I beg your pardon, sir.

The Court: I know some of the jurors are having difficulty in hearing you.

Mr. Haughton: This is a sworn statement made by [60] Salvador Garcia Cervantes in the English language and reads as follows:

"Immigration and Naturalization Service

"U. S. Department of Justice

"District No. 16

"Los Angeles, California

"July 24, 1946

"File No. 1600-31760

"Sworn statement made by Salvador Cervantes-Garcia in the English language before Inspector Earnest A. McFadden in the office of the Immigration and Naturalization Service, Los Angeles, California on July 24, 1946.

"Present: Earnest A. McFadden, Examining Inspector.
Salvador Cervantes-Garcia, Alien
Winifred Lewis, Stenographer.

"By examining inspector to alien:

"Q. I am an Immigrant Inspector of the United States Immigration and Naturalization Service and de-

(Government's Exhibit No. 8)

sire to question you under oath concerning your status under the Immigration laws of the United States. Any statements which you make must be voluntary and may be used by the Government as evidence in any deportation or criminal proceeding. Are you willing to make such a statement freely and voluntarily under oath?

"A. Yes. [61]

Salvador Cervantes-Garcia, being first duly sworn, testified as follows:

Q. You are informed that if you wilfully and knowingly give false testimony at this proceeding, you may be prosecuted for perjury, the penalty for which is imprisonment of not more than five years or a fine of \$2000, or both such fine and imprisonment. Do you understand the warnings? A. Yes.

Q. What is your full, true and correct name?

A. Salvador Cervantes-Garcia.

Q. Have you ever used or been known by any other name? A. No.

Q. When and where were you born?

A. I was born in La Barca, Jalisco, Mexico, December 11, 1922.

Q. Of what country are you a citizen?

A. Mexico.

Q. What are your parents' names; in what country were they born; and what is their citizenship?

A. Father, Antonio Cervantes; born in La Barca, Jalisco, Mexico; he is a citizen of Mexico; mother, Placida Garcia; born in La Barca, Jalisco, Mexico; citizen of Mexico. [62]

(Government's Exhibit No. 8)

Q. Have your parents ever been citizens of any other country? A. No.

Q. What is your marital status? A. Single.

Q. What is your occupation? A. Mechanic.

Q. What is your present address?

A. 137 S. Utah Street.

Q. When and where did you last enter the United States?

A. July 14, 1946 about a half a mile west of the gate at San Ysidro, California.

Q. Were you in possession of an unexpired immigration visa? A. No.

Q. Did you present an unexpired passport or official document in the nature of a passport issued by the government of the country to which you owe allegiance or any other travel document showing your origin and identity?

A. No.

Q. Did you present a valid visa, reentry permit, or border crossing identification card? A. No. [63]

Q. Were you inspected and admitted by an Immigrant Inspector? A. No.

Q. For what purpose did you enter the United States?

A. I wanted to get that clear the thing about the delinquency case.

Q. Was it your intention to reside permanently in the United States?

A. I wanted to get everything straightened out.

Q. Have you ever been admitted to the United States for permanent residence?

A. I don't know, but I think I was.

(Government's Exhibit No. 8)

Q. When and where?

A. I think that was at El Paso in 1923. I was only a year old, and I don't know where we crossed the line.

Q. Have you ever been excluded from the United States or deported or granted voluntary departure in lieu of deportation?

A. No.

Q. Have you ever been arrested?

A. I was arrested in an accident; that is all. I wrecked my brother's car.

Q. When was that? [64]

A. About 1940 in Los Angeles.

Q. What were you charged with at that time?

A. The brakes didn't work, so I had to pay a fine or 8 days in jail. I was also arrested for violation of the Selective Service Act on July 15, 1946 at Los Angeles, California.

Q. Have you ever registered under the Selective Service and Training Act of 1940?

A. Yes, at Local Board No. 200 in Los Angeles, California.

Presents: Notice of Classification from Local Board No. 199, Los Angeles, County, 2334 Brooklyn Avenue, Los Angeles, California, which indicates that Salvador Garcia Cervantes, Order No. N-13153, was classified 1-A September 15, 1943.

Q. When did you receive this classification card?

A. I got it when I came home Sunday.

Q. Have you ever received any orders to report for induction in the Armed Forces of the United States?

A. No.

(Government's Exhibit No. 8)

Q. When did you depart from the United States for Mexico? A. October 30, 1942.

Q. Where did you cross the international boundary line at that time? [65]

A. At the same place where I came back in 1946, approximately one-half mile west of the gate at San Ysidro, California.

Q. Why didn't you attempt to leave the United States through the regular port of entry at San Ysidro, California?

A. Because I didn't think they would let us pass through.

Q. Why did you go to Mexico on October 30, 1942?

A. An uncle of ours took us down there.

Q. Why did he take you to Mexico?

A. I think he didn't want us to go in the Service—I don't know. He said there may be some kind of business over there.

Q. Did your uncle force you to go to Mexico with him? A. No.

Q. Did you desire to depart for Mexico at that time?

A. No, I didn't.

Q. Then why did you depart to Mexico?

A. I always used to follow my brother, and he went with my uncle, so I went too.

Q. What was your draft classification at the time that you departed to Mexico? [66]

A. I didn't have any.

Q. Had you ever considered entering the Armed Forces of the United States? A. Yes.

(Government's Exhibit No. 8)

Q. You have stated that you went to Mexico because your brother went to Mexico, and because your uncle took you to Mexico. Did you have any other reason for going to Mexico? A. No.

Q. Did you depart to Mexico near San Ysidro, California on October 30, 1942 because you did not want to enter the Armed Forces of the United States?

A. I didn't depart for that; I wanted to get in the Army, but like I said before, I followed my brother.

Q. If it was your desire to enter the Armed Forces of the United States, can you explain to me why you departed from the United States on October 30, 1942 and remained in Mexico until July 14, 1946?

A. My brother was fixing with a man named Eugene when the war was on to cross us over there and put us in the Army, and I was waiting for my brother to get his papers, and me and my brother were going to get in the Army. Eugene was fixing it up for my brother to get in the Army, and he was going to fix me up too. [67]

Q. Then, you wish to state under oath that your sole reason for departing to Mexico was to follow your brother? A. Yes.

Q. Did you think that by departing to Mexico you would be able to enter the Armed Forces of the United States? A. During the war, yes.

Q. Will you explain to me how you thought you would enter the Armed Forces of the United States while residing in Mexico?

A. Like I said, Eugene was fixing the papers to come over and get in the Army.

Q. Why did you remain in Mexico from October 30, 1942 to July 14, 1946? A. To avoid the Service.

(Government's Exhibit No. 8)

Q. Did you have any other reason for remaining in Mexico? A. No.

Q. Where did you reside in Mexico during that period of time?

A. 356 Avenue 'E', Tiajuana, B. C., Mexico.

Q. Did you reside there continuously from October 30, 1942 until July 14, 1946?

A. No, we went up to the interior and then we [68] came back.

Q. Did you ever enter the United States during that period of time? A. No.

Q. Then, I would like to repeat one question. When you departed to Mexico on October 30, 1942 near San Ysidro, California, did you have any reason for leaving the United States? A. To avoid the draft.

Q. You have previously stated in this statement that you did not go to Mexico to avoid Service in the Armed Forces of the United States. Are you now changing your story? A. Yes.

Q. Then, do you admit that you departed to Mexico near San Ysidro, California on October 30, 1942 for the sole purpose of avoiding service in the Armed Forces of the United States? A. Yes.

Q. Did you have any other reason for departing to Mexico at that time that you would like to state at this time? A. My brother was going.

Q. Did you ever try to communicate in any way with your Local Draft Board here in Los Angeles? [69]

A. Yes.

Q. When? A. About a year ago.

(Government's Exhibit No. 8)

Q. In what manner did you communicate with them?

A. A man over there, I think he was a Vice Consul in the American Consul in Mexico, he wrote a letter to the Local Board for me, and they said that they did not want me in the Armed Forces, and that I was classified 4-C.

Q. Where did you live during the six months immediately preceding your last entry into the United States.

A. Tiajuana, B. C., Mexico.

Q. Do you have any property or personal effects in the United States other than that with you?

A. No, sir.

Q. Does anyone in the United States owe you money?

A. No, sir.

Q. Is anyone in the United States dependent upon you for support?

A. No, sir.

Q. Have you understood the questions asked you?

A. Yes.

Q. Are you willing to sign this statement? [70]

A. Yes.

Q. Do you wish to say anything else? A. No."

And that is signed by Salvador G. Cervantes.

My witness is here now, if your Honor please.

The Court: Very well, you may put him on the stand.

Miss Zacsek: May I consult with Mr. Haughton a moment before we proceed?

The Court: Yes.

Mr. Haughton: Mr. George.

PAUL O. GEORGE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Paul O. George.

Direct Examination

By Mr. Haughton:

Q. Mr. George, what is your occupation?

A. United States Federal Probation Officer.

Q. And were you such in September, August and September and October of this year? A. I was.

Q. Did you during that time have occasion to interview and talk with Salvador Garcia Cervantes? [71]

A. I did.

Q. Did that conversation take place in this building?

A. Took place in the Federal Probation Office on the 14th floor.

Q. And when did the first conversation take place, if you recall?

A. I think it was around September 12th.

Q. That is of this year? A. 1946.

Q. And who were present at the time?

A. There was the two Cervantes boys, Pete Cervantes and Salvador Cervantes.

Q. Anyone other than yourself and those two?

A. On one occasion the attorney was present.

Q. Will you state the substance of the conversation to the best of your recollection in reference particularly to the defendants' status with the draft board and the reasons for going to Mexico?

(Testimony of Paul O. George)

A. Well, we went over in detail concerning the immigration report, which you read here a few moments ago. The most important item we wanted to cover in detail was why the boys left the United States. They admitted to me it was the fact that they did want to evade the draft, and that they had been influenced by the uncle; they admitted that they were of age and certainly knew what they were doing; that they [72] were mentally capable of knowing it was an evasion.

The main topic covered—the second topic covered was what attempts they had made to contact the Draft Board in Los Angeles where they had originally registered. It appears that there was a lapse of approximately two years, they admitted.

The Court: You say they said that?

The Witness: Yes.

The Court: Who said it?

The Witness: Pete Cervantes.

The Court: And was Salvador Cervantes present?

The Witness: Salvador was present. I get the two boys confused. It is Pete that we are talking about.

The Court: I asked you about the conversation with Salvador.

The Witness: All right, Salvador. Salvador admitted to me that he made no attempt whatever to correspond in writing with the Draft Board here in Los Angeles.

It was brought out in the conversation that Salvador well knew the address here, apparently—I mean, he did not want to contact the Draft Board.

Miss Zacsek: Just a moment. May I ask if that statement or opinion by the witness—

(Testimony of Paul O. George)

The Court: Give us the substance of what he said to you.

Miss Zacsek: May we have that clarified, your Honor? [73]

The Court: All we want is the substance of the conversation or any admissions or statements that Salvador made to you.

The Witness: Well, those were the statements.

The Court: Is that the substance of it?

The Witness: Yes, substance of the statement.

Mr. Haughton: That is all.

Cross Examination

By Miss Zacsek:

Q. Mr. George, during this conversation and others that you had with these boys, particularly the one in which I was present, was there a conversation on the part of Salvador to the effect that he had always followed his brother and had permitted his brother to do his acts for him? A. Yes, there was.

Q. During that conversation—and in fact I will refer to all of the conversations in toto rather than to pick out the different conversations. During the conversations, Mr. George, is it not a fact that it was stated that Peter Cervantes, the older brother, had contacted a Mr. Jean Corteau, who was a member of the Selective Service Board in National City and all the negotiations of contacting the local Los Angeles Board was done for him by Pete through Mr. Corteau?

A. Well, there were conversations to that—what you [74] are talking about, but there was no factual evi-

(Testimony of Paul O. George)

dence that I could find that this third party who you refer to had ever made any contact with the Draft Board.

Q. You yourself never talked to Mr. Corteau?

A. No.

Q. And you of course then had no possession of any documents which Corteau might have had or not had?

A. That is true.

Q. You said that—just a moment, please, Mr. Haughton. If the court will bear with me I want to get a piece of paper.

Now, Mr. George, you said, I believe, that you had the statement made by Salvador to the United States Department of Immigration and Naturalization?

A. Yes, sir.

Q. You remember you said you went over this carefully and in detail. And do you remember a statement in there that the question was: "If it was your desire to enter the Armed Forces of the United States can you explain to me why you departed from the United States on October 30, 1942 and remained in Mexico until July 14, 1946?" And the answer was: "My brother was fixing with a man named Eugene when the war was on to cross us over there and put us in the Army and I was waiting for my brother to get his papers and me and my brother were going to get in the Army. Eugene was fixing it [75] up for my brother to get in the Army and he was going to fix me up too."

Do you remember that?

A. Well, we did not cover that in detail because I didn't know who Eugene—who he was referring to.

Q. Didn't you ask—

A. I was very interested—

(Testimony of Paul O. George)

Q. Just answer the question. Did you ask?

A. No.

Q. Why not, if I may inquire, Mr. George?

A. For the simple reason we were dealing with Mr. Corteau who was the one supposedly contacting the Draft Board.

Q. You know or you had stated that in your opinion the Army would not have taken Salvador in in any event because he was sub-normal mentally, isn't that right, Mr. George?

A. No, I didn't know definitely then, naturally.

Q. I did not say "definitely".

A. All right, no.

Q. In substance isn't it a fact you stated to me what I have just suggested to you? A. No, I did not.

Q. Did you state it in any other terminology, Mr. George?

A. Well, I said he should have gone down and tried to [76] get in. I said that whether they would have taken him, that would have been up to them.

Q. Oh, yes, I know but—

The Court: Just a moment, just a moment. Don't argue with the witness. He answered your question.

Q. By Miss Zacsek: I want to fix in your mind whether or not in my presence while Salvador was present, that in a lowered tone of voice you said to me in substance the following: "He should have gone up there because they would not have taken him anyway because he is sub-normal mentally."?

A. I said, "It is too bad he did not go down to the Army and try to get in."

(Testimony of Paul O. George)

Q. "Because they would not have taken him anyway because he is sub-normal mentally." Did you or did you not say that?

A. I am not a medical examiner; I could not make a prediction like that.

Q. It is not a question of what you could or couldn't do or said. Did you say that? A. No, I did not.

The Court: Answer the question yes or no.

The Witness: No.

Q. By Miss Zacsek: Mr. George, may I ask you this then— [77]

The Court: He answered your question.

Q. By Miss Zacsek: Whether or not you stated to me this—you had given him a questionnaire to fill out and evidently he had sat there for some time, for some considerable time and finally got two or three words on the questionnaire, whereupon you stated to me that in your opinion the man was sub-normal mentally because if I would note the incredible length of time it took for Salvador even to write out two or three words. Now, does that refresh your memory?

A. It was not put in that language.

The Court: In substance?

The Witness: In substance I said, "It is too bad he can't fill this form out." I said, "I can't understand it."

Q. By Miss Zacsek: That is right. Didn't you say in substance that it took an unreasonably or unbelievable length of time for him to get two or three words down?

A. Yes, I did.

Q. And do you remember I said, "Yes, I know that. That is the reason that I filled out most of the forms for him." Do you remember that? A. Yes.

(Testimony of Paul O. George)

Q. And you remember it was in connection—in that connection that you then said, “Well, I am afraid he couldn’t get into the Army because he seems to be so sub-normal [78] mentally.”

A. I said, “It is too bad he has not gone down to the Army because he probably would not have been taken in.”

Q. That is right.

A. But that is not a fact.

Q. I did not ask for a fact.

The Court: Just a moment, counsel, just a moment. I have warned you sufficiently and just because you happen to be a woman does not give you any special privilege in this court. Now, just confine your questions to questions without arguing with the witness. There is no occasion for dramatics in asking questions.

Miss Zacsek: Yes, your Honor. Yes, your Honor.

Q. Was it your opinion then, Mr. George, merely your opinion, that Salvador was somewhat under par from the normal, average mentality?

The Witness: Will you read the question?

(Question read.)

The Court: I direct the witness not to answer the question. That does not have anything to do with the issues in this case. There is no plea of insanity here.

Miss Zacsek: No.

Q. Mr. George, when you examined this statement that I have just read from the statement given by Salvador to the Department of Immigration and Naturalization Service, their [79] representative, and you came across the words, “Mr. Eugene,” do you recall in that connection that during your conversations with Salvador

(Testimony of Paul O. George)

that Salvador had used the words "Mr. Eugene" constantly in reference to Corteau or in reference to the man who was helping Pete?

Mr. Haughton: I object to that as assuming a fact not in evidence and calling for an opinion of the witness.

The Court: Let the witness answer it if he knows.

The Witness: I made no connection with Jean. All I have reference to is what you said, "Mr. Corteau."

Q. By Miss Zacsek: You knew of course Mr. Corteau's name was Jean Corteau? A. No, I did not.

Q. Did you see any letters at all purportedly written to Mr. Corteau by Pete or Salvador? A. Yes.

Q. Can you recall the substance of any of those?

The Court: Counsel, the letters are the best evidence. Are they the ones introduced in evidence here?

Miss Zacsek: Yes.

Q. I am going to show you a series of papers, Mr. George, and ask you whether any of these has been presented for your consideration before this? A. Yes.

The Court: Just answer the question yes or no. [80]

The Witness: Yes.

Q. By Miss Zacsek: Let me show you all of them, please, Mr. George, and then perhaps you can select from these various exhibits for identification those which you have seen before. A. These.

Q. Which ones, Mr. George, please? The ones on your right? A. The ones on the right.

Q. Then you had seen the letter dated April 2nd, 1946 at San Ysidro, addressed to Pete Cervantes and signed by Eugene Corteau, Sr., "S. S. Board No. 165"?

A. Yes.

(Testimony of Paul O. George)

The Court: If you will refer to them by exhibit number it will keep the record straight.

Miss Zacsek: Thank you, your Honor. That is Defendants' Exhibit E for identification.

Q. By Miss Zacsek: You had seen a letter then addressed, or this being Defendants' Exhibit I for identification, addressed at San Ysidro, July 23rd, 1946 to Anna Zacsek and signed "Eugene Corteau, Sr., Member of the Selective Service Board No. 165, San Ysidro, California." A. That is correct.

Q. And both of these documents to which you have testified by saying yes, both numbers I and E for identification have been printed on the letterhead of the Selective Service Board, is that right?

A. That is correct.

Q. Now, in that connection, Mr. George, do you now recall having examined these documents and had your memory refreshed that you had a conversation relative to this Jean Corteau, Sr., and that he was referred to by both Salvador and Pete Cervantes as "Mr. Eugene"?

A. No; I just remember Mr. Corteau.

Q. Then as far as you were concerned you never in your mind at least, connected the two individuals, the two names as being one individual? A. No.

The Court: Counsel, this witness is under cross examination for conversations that he had and I am going to restrict the cross examination to that.

Miss Zacsek: Thank you, your Honor.

Q. Now, Mr. George, did you at any time see the piece of paper which lies before you on the desk which has the two photographs on it of Pete, on both—of both the front and side views? A. Yes.

(Testimony of Paul O. George)

Q. And in that connection do you remember that Salvador told you or, I will withdraw that question and ask you if you had also at that time seen this little piece of [82] paper which I now place before you?

A. I am not positive I remember seeing this exhibit.

Q. Referring to Defendants' Exhibit I for identification. Would this refresh your recollection, Mr. George, if I suggested to you that at the time of the conversations with Salvador he showed you this piece of paper which he said was a photostatic copy of the original which was his volunteering into the Mexican Army?

A. Yes, he showed me that.

Miss Zacsek: Now, I move the court to introduce this piece of paper as the defendants' exhibit next in order.

Mr. Haughton: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Miss Zacsek: Then I move respectfully to introduce it for the purpose of identification at this time.

The Court: It may be marked for identification.

(The document referred to was marked as Defendants' Exhibit I, for identification.)

Q. By Miss Zacsek: In that connection Salvador told you among other things—

The Court: What is the date of that document?

Miss Zacsek: If I may look at the original; this is so dim I cannot read it even with my glasses and I was unable to get a magnifying glass during the recess—23rd of December, [83] 1942.

Q. By Miss Zacsek: Now, in that connection did Salvador tell you when he and his brother and his uncle

(Testimony of Paul O. George)

arrived in Guadalajara that he volunteered into the Mexican Army? A. That is what they told me.

Q. And that that little paper which purports to be a photostatic copy of Defendants' Exhibit E for identification, was his certificate or copy of the certificate of his volunteering into the Army, is that right?

Mr. Haughton: Object to that.

The Court: Read the question.

(Question read.)

The Court: Objection sustained.

Q. By Miss Zacsek: What I should have asked you, of course, Mr. George, was this: Did he tell you that that was a photostatic copy of the original he received when he volunteered into the Army?

A. Well, that is what he told me.

Q. What? A. I say, that is what he told me.

Q. Thank you. Now, when this matter of the paper which you said you had gone over very carefully with him, on page 5 of the same questionnaire of questions and answers of Salvador Cervantes, before the Naturalization Agent or [84] Department of Naturalization rather, do you remember this question asked of Salvador and this answer which appears on this paper:

"Did you ever try to communicate in any way with your local Draft Board in Los Angeles?"

"A. In Los Angeles?"

And the answer was: "Yes."

"Q. When? "A. About a year ago.

"Q. In what manner did you communicate with them?"

"A. A man over there, I think he was a Vice Consul in the American Consul in Mexico, he wrote a letter to the

(Testimony of Paul O. George)

Local Board for me and they said that they did not want me in the Armed Forces and that I am classified 4-F."

Mr. Haughton: 4-C.

Miss Zacsek: I beg your pardon. Thank you. I am glad you brought that up.

Q. Now, do you remember that particular phase of the questioning? A. Yes, sir.

Q. Did you discuss with Salvador as to who this person in the American Consulate was who had attempted to, or who had written a letter for Salvador?

A. No, I did not. [85]

Q. Did you ask him anything about the letter which he said had been written in which they said he was classified 4-C and that they did not want him?

A. Will you repeat that?

Q. I will reframe it. Did you say or inquire of Salvador as to who this letter which he had mentioned, which had been purportedly sent by the Board saying he was not wanted?

A. No, I did not question him about it.

Q. During the conversation with Salvador and with Pete in which—and the conversation which I attended, in substance and effect did Salvador tell you that he had relied and depended upon Pete to effect whatever negotiations could be made for them both as far as communicating with the Local Board was concerned?

A. No, he did not say it in those words.

Q. Well, in substance or in effect, Mr. George?

A. Well, he could have employed it but he didn't say it in words as a fact.

Q. All right then, did he imply it in his conversation?

(Testimony of Paul O. George)

The Court: Let us get the conversation and not what was implied. You objected to that this morning when the other witness was on the stand.

Miss Zacsek: Thank you.

Q. Did he say anything in substance, Mr. George, or in [86] effect that he was relying upon his brother Pete for all the activity, if any, that was done in relation to communicating with the Selective Service Board?

A. I did not get that impression at all. Definitely not. He was being talked to as an individual and could answer as an individual for himself.

Q. Yes, of course, but I don't think you have understood my question, Mr. George. What I am trying to get at is this. He told you among other things that his brother was negotiating with a Mr. Eugene? A. He did.

Q. And that his brother was corresponding with a Mr. Eugene? A. He did.

Q. And that Mr. Eugene, or mostly he called him Jean, Mr. Eugene would come from San Diego to Tia Juana and talk to his brother? A. That is correct.

Q. And Mr. Eugene was writing letters to the Board for Pete? A. That is right.

Q. And in substance that Mr. Eugene was a member of the Selective Service Board in National City or in San Ysidro? A. That is correct.

Q. Now, did he then also tell you that he depended on [87] Pete and Mr. Eugene to take care of him, Salvador? A. I don't remember.

Q. Did you hear him state in substance or effect that he believed that when Mr. Eugene got Pete straightened out that he would be straightened out also?

(Testimony of Paul O. George)

A. Yes, that phase of it—you are correct there.

Q. Thank you.

The Court: Any further questions?

Mr. Haughton: No further questions.

The Court: That is all.

Mr. Haughton: Government's Exhibit No. 9 is the statement which Pete Cervantes gave to the agent of the F.B.I. It is dated July 29th, 1946, and reads as follows:

At the top of the page it is dated July 29th, 1946:

"I, Pete Garcia Cervantes, do make this voluntary statement to Edward E. Kachelhoffer, who has identified himself to me as a Special Agent of the Federal Bureau of Investigation, and who has further advised me that I do not need to make a statement and if I do make a statement it may be used in court as evidence. No threats or promises of any kind have been made to me to obtain this statement.

"I was born August 12th, 1919, at La Barca, Mexico. I was brought to the United States by my parents in 1923. I never returned to Mexico until [88] October 30, 1942. From 1923 until October 30, 1942, I lived in the United States with my parents, Antonio Cervantes and Placida Garcia at 137 South Utah Street, Los Angeles, California, for about ten years.

"I attended Utah Street grade school and Hollenbeck Junior High School and Frank Wiggins Trade School until I was 18 years old and then I started working.

"I worked for Swift & Co., Brown Derby, Furniture Land, Y. Gomez Market and in my own meat market lo-

(Government's Exhibit No. 9)

cated at Brooklyn and Boyle. The last employment I had before going to Mexico was with Swift & Co. I quit my employment with Swift & Co. the day before I left for Mexico and gave as a reason for quitting that I was going into the United States Army. I registered under the Selective Training & Service Act in Los Angeles on October 16, 1940, giving my address as 137 South Utah Street, Los Angeles. I am a registrant of Local Draft Board No. 199 in Los Angeles. I was given a Selective Service blood test about the middle of October 1942, and about two weeks later I received a 1-A classification, and shortly thereafter I received a notice to report for induction on November 9, 1942.

"I received the order to report for induction [89] about a week prior to October 30, 1942, the date on which I left Los Angeles for Mexico. The date on which I was to report for induction was November 9, 1942. The reason that I left for Los Angeles at the time for Mexico was to avoid induction into the military service of the United States. I entered Mexico at Tijuana on October 30, 1942, passing through the immigration station at San Ysidro, California. My brother, Salvador, and my uncle, Trinidad Garcia, were with me. We traveled in my uncle's automobile. While I was in Mexico I lived in the State of Jalisco and in Tijuana, B. C. While in Mexico I worked as a butcher for a short time and later purchased a pool hall which I sold and purchased a shoe repair shop. The shoe repair shop is located in Tijuana and I still own the shop. In my absence the shop is being operated by David Valencia who I think left the United States to avoid military service.

(Government's Exhibit No. 9)

"Before I went to Mexico the only property I owned was a 1937 Dodge sedan which I sold in October 1942. About December 10, 1945 I started making inquiries as to my draft status in the United States and if I might go into the Army if I returned. I wrote my draft board in December 1945 as to my status and was advised they could take no action in the [90] matter. Finally I decided to return to the United States after I gained the impression from talking to people in Tijuana that I would be permitted to join the United States Army. I returned to the United States the morning of July 14, 1946, crossing the border near San Ysidro, California. I did not pass through the immigration Port of Entry at San Ysidro because I had no visa, passport or other papers.

"I have read this two-page statement and it is truth and correct."

That is signed "Pete Garcia Cervantes."

Following that Government's Exhibit 10 is a transcript of the proceeding held in the office of the Immigration and Naturalization Service in reference to Pete Cervantes. It is entitled "Immigration and Naturalization Service, U. S. Department of Justice, Los Angeles District 16. No. 1600-31759" and is dated July 24, 1946.

The Court: Counsel, it is almost impossible to hear you.

Mr. Haughton: I will attempt to do better. This is a sworn statement of Pete Cervantes and reads as follows:

"Q. You are advised that I am an Immigrant Inspector of the United States Immigration and Naturaliza-

(Government's Exhibit No. 10)

tion Service, and as such am authorized by law to administer oaths in connection with the [91] enforcement of the Immigration and Naturalization laws. I desire to take a statement from you under oath, concerning your right to be and remain in the United States. Any statement you make should be voluntary, and you are hereby warned that it may be used as evidence in any subsequent proceeding, either criminal or deportation. Do you understand the nature of an oath? A. Yes.

Q. Are you willing to make a statement and answer questions under these conditions? A. Yes.

"Pete Cervantes-Garcia, being first duly sworn, testified as follows:

Q. What is your full, true and correct name?

A. Pete Cervantes-Garcia.

Q. Have you ever used or been known by any other name? A. No, sir.

Q. When and where were you born?

A. I was born in La Barca, Jal. Mexico either August 11, 1919, or August 12, 1919.

Q. Of what country are you a citizen?

A. Mexico, I guess.

Q. What are your parents' names, birthplaces [92] and citizenship-

A. Antonio Cervantes, born in Mexico; citizen of Mexico; Placida Garcia, she was born in Mexico; she is deceased, but she was a citizen of Mexico.

Q. Have they ever been citizens of any other country?

A. No, sir.

Q. What is your marital status? A. Single.

(Government's Exhibit No. 10)

Q. What is your occupation?

A. I am a butcher and shoe repair man.

Q. What is your present address?

A. 137 So. Utah St., Los Angeles, California.

Q. When and where did you last enter the United States?

A. I crossed the border from Tijuana on July 14, 1946, about a mile west of the gate at San Ysidro, California.

Q. Were you in possession of an unexpired immigration visa? A. No, sir.

Q. Did you present an unexpired passport or official document in the nature of a passport issued by the government of the country to which you owe allegiance or other travel document showing your [93] origin and identity? A. No, sir.

Q. Did you present a valid visa, reentry permit, or border-crossing identification card? A. Never did.

Q. Were you inspected and admitted by an Immigrant Inspector? A. No, sir.

Q. For what purpose did you enter the United States?

A. To come and get in the United States Army, sir.

Q. Was it your intention to reside permanently in the United States?

A. Yes, if I could get in the Army.

Q. Have you ever been admitted to the United States for permanent residence?

A. When I was a small kid in 1923.

Q. Where were you admitted to the United States at that time? A. I think at Laredo, Texas.

(Government's Exhibit No. 10)

Q. Have you ever been excluded, or deported from the United States or granted voluntary departure from the United States in lieu of deportation?

A. No, sir, never did. [94]

Q. Have you ever been arrested?

A. Yes, I was arrested for violation of the Selective Training and Service Act at Los Angeles, California on the 15th of July, 1946.

Q. Have you ever registered under the Alien Registration Act of 1940? A. Yes, sir.

Q. Do you know your Alien Registration number?

A. No, sir.

Note: File shows number as 3222154.

Q. Have you ever registered under the Selective Training and Service Act of 1940?

A. Yes, sir. At local board 199.

Q. Where is No. 199 located?

A. Whittier Blvd., Los Angeles, California.

Q. Do you know your order number? A. 4664.

Q. Where did you live during the six months prior to your entry to the United States on July 14, 1946?

A. I lived at 356 Avenue E, Tijuana, B. C., Mexico.

Q. Do you have any property or personal effects in the United States other than that with you?

A. Yes, at 137 S. Utah, I have a suit. [95]

Q. Does anyone in the United States owe you money?

A. No.

Q. Have you ever received orders to report for induction into the armed forces of the United States?

A. Yes, sir, I did, sir.

(Government's Exhibit No. 10)

Q. When did you receive these orders for induction?

A. I think on November 9, 1942.

Q. What did you do when you received these orders to report for induction?

A. I went down to the Local Board to get a defferrment for 30 days, I was turned down, sir.

Q. Then did you report for induction into the armed forces of the United States?

A. No, sir.

Q. What did you do?

A. An uncle of ours came from Mexico and took us there.

Q. When did you depart to Mexico?

A. On October 30, 1942, because it was on Hallowe'en.

Q. Where did you cross the International Boundary Line?

A. Thru the river about one mile west of the gate. [96]

Q. Why did you depart to Mexico at that time?

A. Because an uncle of ours was coaching us to go over there.

Q. Did you have any reason of any kind for going to Mexico at that time?

A. To avoid the draft—Selective Service Training.

Q. Did your uncle force you to go to Mexico with him at that time?

A. No, he didn't force us to go.

Q. Then do you admit that you departed to Mexico near San Ysidro, California on October 30, 1942, for the sole purpose of avoiding service in the armed forces of the United States?

A. Yes, sir.

(Government's Exhibit No. 10)

Q. Did you have any other reason for going to Mexico at that time? A. No, sir.

Q. Did you reside continuously in Mexico from October 30, 1942 until July 14, 1946? A. Yes, sir.

Q. What was your purpose in remaining in Mexico for that period of time?

A. Well, I had no immigration to come across at that time, and I didn't have no papers to come [97] across until I met Mr. James from Local Board 165 at San Ysidro, and he said he was going to help me.

Q. Why did you decide to return to the United States on July 14, 1946?

A. To get in the army, sir. I have been trying to come across, sir.

Q. Were you aided in any way by any person to enter the United States? A. No, sir.

Q. Are you supporting anybody in the United States at the present time? A. No, sir.

Q. Is there any person in the United States who is dependent upon you in any way for support?

A. No, sir.

Q. Have you understood all the questions I have asked you here? A. Yes, sir.

Q. Are you willing to sign this statement?

A. Yes, sir.

Q. Do you wish to say anything else at this time?

A. No."

And that is signed "Pete G. Cervantes".

The Court: At this time we will take our afternoon recess of ten minutes, and the jury will bear in mind the [98] admonition the court has heretofore given you.

(Short recess.)

The Court: Will you stipulate the jurors are present and in the jury box and the defendants are in court with their counsel?

Miss Zacsek: So stipulated, your Honor.

Mr. Haughton: So stipulated.

Miss Zacsek: It has been brought to my attention the two defendants have not been clearly distinguished, so may I at this time identify them and each of them?

The Court: Yes.

Miss Zacsek: Will you arise? This is Peter Cervantes, and this is Salvador Cervantes.

Thank you, your Honor.

Mr. Haughton: If the court please, I think I have completed reading all the matters introduced by the Government of any consequence, except miscellaneous items that can be examined later if the jury wishes, and with that the Government rests.

The Court: You may proceed.

Miss Zacsek: Will you take the stand, Mr. Peter Cervantes?

PETE G. CERVANTES,

having been first duly sworn by and on behalf of the defendants, was examined and testified as follows: [99]

The Clerk: Please state your name.

The Witness: Pete G. Cervantes.

Direct Examination

By Miss Zacsek:

Q. Mr. Cervantes, where were you born?

A. In La Barca, Mexico, August 12, 1919.

Q. And when were you brought to the United States as best you know?

A. I was brought to the United States with my parents in the year of 1923.

Q. Did your father, as far as you know, ever become a citizen of the United States? A. No.

Q. Did he ever, as far as you know, attempt to become such a citizen? A. No.

Q. Did you yourself—are you yourself a citizen of the Republic of Mexico? A. I guess so.

Q. And as far as you are concerned have you ever made any attempt to become a citizen of this country?

A. No.

Q. And have you at any time or place declared your intention to become a citizen? A. No. [100]

Q. When you were required to register under the Selective Service Act I take it you received a piece of paper which is introduced here as Government's Exhibit 5, which has printed on the head of the first sheet the words "Selective Service Questionnaire", is that correct?

A. That is right.

(Testimony of Pete G. Cervantes)

Q. And in this questionnaire there appears on certain lines in between the printed material handwriting in ink. Is that your handwriting? A. That is right.

The Court: Where are you referring to?

Miss Zacsek: The part written in longhand.

The Court: You are speaking of the part of the form that was filled in?

Miss Zacsek: Yes, on the lines in ink which appear between the printed material, which is printed on the pages of this questionnaire.

Q. All this ink handwriting is your handwriting, is that correct? A. That is right.

Q. Now, in this handwriting and on page 4 under the heading "Family Status" and "Dependents" there is stated "None". There appears certain printed words in front of that—in front of some little squares as follows: "I am" square "Single". Square "Widower". Square "Divorced". Square "Married". And so forth. Also "I" and then a [101] blank "live with my wife",

Now, in that particular line of printed material there appears to be an ink check in the space marked "Single". Did you place that check there? A. I did.

Q. I will then call your attention to page 6 which in printing appears the word "Citizenship" and under that are eight numbers with printing and bear lines. In other words, the printing on No. 1 says: "I was born at" blank in which in writing in ink appears the following words: "La Barca, Jalisco, Mexico." Did you put that in?

A. That is right.

The Court: You wrote in everything which says you were born in Mexico and that you were not a citizen of the United States?

(Testimony of Pete G. Cervantes)

The Witness: That is right, your Honor.

Q. By Miss Zacsek: You have here, "I am not a citizen of the United States."

And No. 5: "I am a citizen or Subject of La Barca, Jalisco, Mexico" and "My alien registration number is 3222154."

Under No. 7 you have written: "I have not" and then in printing "filed a declaration of intention to become a citizen of the United States" and then in parentheses "first paper." Then in printing "Declaration filed at" [102] and then a blank and there appears in handwriting the word "None", and printing "on month, day, year", and again there is a blank in which the handwriting appears "None".

Now, did you under 7 of this particular heading "Citizenship" write in the words "None, none, none,"?

A. I did.

Q. And on No. 8 again we have the handwriting—

The Court: So the jury will understand, why don't you have him point out that he has written: "I am not a citizen, I have not filed any papers." In other words, you said "None, none, none," and that does not mean anything to the jury. He said, "I have not filed a declaration of intention to become a citizen of the United States. Declaration filed at none." Is that your handwriting there?

The Witness: Yes, sir.

The Court: And you have also written in: "I have not filed a petition for naturalization" and under "Petition filed at" you wrote "None" and so forth?

The Witness: That is right.

(Testimony of Pete G. Cervantes)

Q. By Miss Zacsek: Now this paper, on the last sheet thereof, on page 8, you have signed your signature and you evidently signed it and swore to that before one Nathan Klein at the advisory board No. 199, is that right? A. That is right.

Q. In other words, this questionnaire was filled out [103] by you as it now appears and was sworn to by you and signed by you in front of a member of the Advisory Board of Local Board No. 199?

A. That is right.

Q. And at that time did you have with you or in your possession an alien registration bearing the number which should appear here, 3222154? A. I did.

Q. And previous to the time that you had then filled this blank you had registered under the alien registration law of the United States, is that correct?

A. That is right.

Q. Now, at the time and place where you signed this questionnaire and swore to it before a member of the Advisory Board of Local 199, did you at that time know or had anybody told you that being an alien that you had a right to claim exemption from the draft because of the fact that you were an alien? A. No, I didn't.

Q. Did anybody advise you at that time and place that because you had declared that you were not a citizen, that you had never declared a desire to become a citizen and that you had at no time or place filed a petition to become a citizen that therefore you were not a resident within the meaning of the law? A. No. [104]

Q. Did you know anything whatsoever about the fact that there was in the Selective Service Board or Selective

(Testimony of Pete G. Cervantes)

Service Training Act, rather, an exemption which would cover your case inasmuch as you were a non-resident within the meaning of that Act?

Mr. Haughton: I object to that as it assumes both a fact and a matter of law.

The Court: Objection sustained.

Q. By Miss Zacsek: Had you heard at any time or place that the United States had in the Selective Service Act made a provision for people like yourself who were not residents or citizens of this country—

Mr. Haughton: Object to that as immaterial and incompetent.

The Court: Same ruling.

Q. By Miss Zacsek: Did Mr. Nathan Klein who attested to your signature on the 25th day of June, 1923, talk to you at all about the matters which appear under the heading of "Citizenship"? A. Never did.

Q. Did any member of the Advisory Board of Local 199 on this day say anything to you whatsoever about the fact that you had an alien registration number and card?

A. Never did.

Q. Did anybody at that time or any time before that [105] tell you anything about the facts as pertaining to you of alien citizenship in relation to the Draft Board—draft law? A. Never did.

Q. Did you have any knowledge about it at that time whatsoever? A. No.

Q. Did you have any knowledge about it at that time whatsoever? A. No.

Q. Now, to get back to your residence for a moment in Mexico. You said you lived there until you were about three years old, is that right? A. Yes.

(Testimony of Pete G. Cervantes)

Q. And then came here? A. Yes.

Q. Did you have an uncle? A. I did.

Q. And what relation—and what—I withdraw that, please.

Did this uncle accompany you and your family to California, if you know? A. He did.

Q. Did this uncle have any children of his own?

A. He did. [106]

Mr. Haughton: I object to that as incompetent, irrelevant and immaterial.

The Court: Well, it is answered.

Mr. Haughton: Move the answer be stricken for the purpose of the objection.

The Court: It is too late. He may have had some grandchildren for all we care.

Miss Zacsek: Well, it is merely a foundation. It is of no particular moment in any event.

The Court: Proceed.

Q. By Miss Zacsek: Now, where did this uncle stay, if you know, during the first few years that you people lived in California?

Mr. Haughton: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. By Miss Zacsek: Did this uncle, as far as you know, depart back to the Republic of Mexico?

A. He did.

Mr. Haughton: Objected to.

The Court: Well, it is answered.

Q. By Miss Zacsek: When was that, Pete?

(Testimony of Pete G. Cervantes)

The Court: Counsel, I understand from the statement here this uncle is dead?

Miss Zacsek: Yes, he is. [107]

The Court: He is not on trial here today. Let us try these two defendants. About their having an uncle is immaterial. He can tell why he went to Mexico if he did, but we are not interested in his uncle anymore than we are in his grandparents. That has nothing to do with the facts in this case.

Miss Zacsek: May it please the court—

The Court: We are trying everybody but these defendants.

Miss Zacsek: That is right, I am not interested in the uncle. The difficulty I am confronted with is this—in the questionnaires given by these boys—may it please the court, in this there is so much reference to this uncle. I thought the jury might get a foundation of who this person was and that is all.

The Court: There has been a great deal said about the uncle but it hasn't anything to do with whether or not these defendants violated the Selective Service Act. It may be interesting to the jury but it isn't very interesting to the court. The jury may want to listen to it, but the court doesn't.

Q. By Miss Zacsek: Now, Pete, if you know—

If the next question is out of line I am sure the court will bear with me, but I think this is material.

Did this uncle return from Mexico and have conversations with you relative to going with him to Mexico? [108]

A. He did.

(Testimony of Pete G. Cervantes)

Q. How often did he return and have such conversations?

A. He was there about, maybe, two weeks, one month or a month and a half apart.

Q. Apart? A. Apart.

Q. How many conversations occurred during these intervals of time?

A. Well, every time he used to come he used to come and say the same thing.

Q. How often did he return, Pete, to talk to you?

A. Every two weeks, maybe a month.

Q. How many talks did you have altogether then?

A. Oh, say about—there were plenty. That is all he used to talk of.

Q. All right. Now, in these conversations who was—was Salvador present? A. He was not.

Q. Just you? A. Right.

Q. And were these conversations virtually the same on each occasion? A. That is right.

Mr. Haughton: Objected to as incompetent, irrelevant and immaterial and there is no proper foundation laid. [109]

The Court: The question of intent is involved. I am going to give pretty broad latitude. I am going to permit the question to be answered.

Miss Zacsek: Will you read the question?

(Question and answer read.)

Q. Now, Pete, you were given a registration card, that is right, isn't it, bearing the date of December, or, I mean, pardon me, June 30th, 1942? That is right, isn't it?

A. Yes.

(Testimony of Pete G. Cervantes)

Q. At the time that you were given this card did you receive it in person or was it sent to you through the mail?

The Court: What do you mean by "registration card"?

Miss Zacsek: Yes, this People's Exhibit No. 1.

The Court: Selective Service card. As a matter of practice they had to register. We know they go to some board and register. Even an old fellow like me had to go and register and sign one of those cards and carry a card.

Q. By Miss Zacsek: And did you sign this card in Local 199? A. I did.

Q. Now, at the time you signed this did anybody there speak to you in any fashion about your status as an alien? A. Nobody did.

Q. Or what the provisions were which the United States had made for people like yourself? [110]

A. No.

Q. Then calling your attention to People's Exhibit No. 4, which is the registration report, when and where did you first see that? A. When I registered in 1940.

Q. And they gave you that, did they?

A. They gave me this.

Q. And at that time did anybody speak to you about your status as an alien or what the United States, if anything, had done about people like yourself?

A. Never did.

Q. Now, what did this uncle say to you and what did you say to him—

The Court: I am not going to permit that. I do not intend to permit those conversations. You are trying to

(Testimony of Pete G. Cervantes)

bring out a conversation with a dead man. It is too far fetched.

Q. By Miss Zacsek: Pete, during the years that you grew up had you been with this uncle during any part of those years from the time you came to the United States until you left with him?

A. Up to the year of 1932.

Q. Up until that time? A. Yes, sir.

Q. How old were you when he left? [111]

A. I was about 12 or 14, I think.

The Court: I can't hear you.

The Witness: About 12 or 14.

Q. By Miss Zacsek: Now, during those—

And this I think is important, your Honor.

The Court: You do not need to emphasize it. That is a question for the jury, the importance of anything.

Miss Zacsek: I am addressing myself to the court.

The Court: But the jury hears you just the same.

Miss Zacsek: This is as to intent.

Q. During those years, Pete, did your uncle live with you? A. That is right.

The Court: That is, up until 1932?

The Witness: That is right, your Honor.

Q. By Miss Zacsek: In this household your mother was dead by that time, wasn't she? A. She was.

Q. Now, in the household which consisted of your brother, sister, father and this uncle, who was the head of the house? A. My uncle.

Q. Did your father come under his jurisdiction so to speak?

(Testimony of Pete G. Cervantes)

The Court: Counsel, this offense was committed in [112] recent years. There is no occasion to go into the matter of who was the head of the family. This man is a man who is charged with an offense. Let us get down to the issues in the case.

Miss Zacsek: May I respectfully make an offer of proof?

The Court: No, you may submit it in writing. I do not care to have it made in front of the jury. You may submit it in writing and present it to the court in the morning.

Miss Zacsek: Thank you.

Q. How had you been conditioned or taught, rather, to regard the voice or the orders or directives of your uncle?

The Court: Just a moment. Do not answer that question.

Counsel, I do not expect you to pursue that any longer.

Miss Zacsek: Very well, your Honor.

Q. Your uncle came the last time to speak to you. What if anything did he say or do as far as your judgment is concerned concerning going back to Mexico?

The Court: Just a moment. I am going to direct the witness not to answer that question. I don't care what the uncle said to him. Let him tell why he went to Mexico if he did go. He can explain it in his own way as to why he went to Mexico.

Miss Zacsek: All right.

Q. You did go to Mexico, of course? [113]

A. I did.

Q. With your uncle? A. That is right.

(Testimony of Pete G. Cervantes)

Q. Now, following the court's suggestion I am going to ask you to tell the jury and the court why you went in as much detail as the court will allow.

A. Shall I start in, your Honor?

The Court: Go ahead.

A. Well, it was this way. I was going into the Army then. I had an automobile accident, see, and I was in bed and I told my wife to go out and get a 30-day deferrment, which they denied me. Well, at that time when they called me I had an automobile accident in which I was in bed and I couldn't get up. I sent my wife to get a 30-day deferrment which they denied me and this uncle, he comes over and says, "You are crazy, you want to stay here. They will kill you. You better come over there. I got business and everything up there for you," and I was in bed and I was sick so I went up there. My wife was pregnant and everything was all mixed up. I guess I just felt that I was getting a rotten break.

The Court: The uncle advised you to go to Mexico to keep from getting killed?

The Witness: That is right, your Honor.

The Court: And you followed his advice, did you?

The Witness: I did. [114]

The Court: And that is the reason you went to Mexico, so you would not have to go into the Army, is that right?

The Witness: That is right, your Honor.

Q. By Miss Zacsek: All right, Pete. Before this had occurred did you make any effort to get into the defense plants?

(Testimony of Pete G. Cervantes)

The Court: Just a moment. That is immaterial, counsel. There are two charges, here.

Miss Zacsek: That is right.

The Court: He is not charged with failure to work in a defense plant.

Miss Zacsek: That is right.

The Court: That question is immaterial.

Miss Zacsek: I will proceed.

Q. All right, Pete, at that time what if anything was said or done about your brother Salvador?

A. Well, he wasn't present at the time we used to talk.

Q. All right, when you departed with your uncle did Salvador go along? A. Yes, he did.

Q. Now, will you tell us in your own words if you know how it happened that Salvador went with you?

A. Well, he was a young kid yet and by the time you could come back and get into the Army— [115]

Q. Who said that?

A. "By the time you are called you can come back and get into the Army."

Q. Who said that? A. I did.

Q. All right.

A. He was only 19 and they were calling boys from 21 and up at that time.

Q. During your lifetime what was your relationship to your brother as far as any direction was concerned?

A. Well, I was a bigger brother and he used to do what I tell him to do.

The Court: That was not my experience when I was a young fellow. I did just the opposite from what my big brother told me to do. But that is immaterial to this hearing.

(Testimony of Pete G. Cervantes)

Miss Zacsek: All right.

Q. So you went to Mexico with this uncle. Did you yourself have any papers, documents or otherwise to get into Mexico? A. No.

Q. How did you get into Mexico?

A. Well, we pass through the line in a car.

Q. Whose car? A. My uncle's car. [116]

Q. Did you speak to anyone as you passed through the line?

A. No; I just pass—we just passed, that is all.

Q. Where did you go? That was Tijuana?

A. That is right.

Q. Where did you go from there?

A. We went to Mexico.

Q. Where? A. Guadalajara, Mexico.

The Court: How soon after you crossed the line did you go to Guadalajara?

A. Three weeks or a month.

The Court: How long did you remain there?

The Witness: Well, I remained there waiting—you see, they going to call me in the Mexican Army.

The Court: How long did you remain? A week or a month?

The Witness: No, about eight months.

The Court: And then you returned to Tijuana?

The Witness: No, we stayed about 8 months in Guadalajara.

The Court: Then you returned to Tijuana?

The Witness: That is right.

The Court: And you remained there until you came back to the United States?

(Testimony of Pete G. Cervantes)

The Witness: That is right, your Honor.

Q. By Miss Zacsek: Now, when you went to Guadalajara [117] did you do anything about the Mexican Army? A. We volunteered in the Mexican Army.

Q. If you do not speak up I cannot hear you across the room and I am certain I couldn't hear any of the conversation you had with the court.

A. Well, I volunteered in the Mexican Army.

Q. Now, I am going to show you that piece of paper which has been here introduced as an exhibit, it being the defendants' Exhibit No. F for identification, and ask you what that piece of paper is? A. (No answer.)

Q. Did you receive it? A. I did.

Q. And when did you receive it?

A. The day I volunteer.

Q. From whom did you receive it?

A. From, well, the military officer.

Q. From a military officer? A. Yes.

Miss Zacsek: I now move to introduce that into evidence, your Honor.

Mr. Haughton: Objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: The objection will be sustained. I am still taking the position I took this morning that he cannot go [118] across the line to Mexico and offer to volunteer into the Mexican Army and avoid his responsibility to this Government.

Miss Zacsek: And I am still taking the position of the treaty between the governments as being paramount to any opinion of counsel or courts, unless we have the

(Testimony of Pete G. Cervantes)

most authoritative voice on that subject, your Honor, and I say that with the utmost respect.

The Court: I am not worrying about respect. Go ahead.

Miss Zacsek: I just want the court to know I do bear the court profound respect.

The Court: The only thing is, there are certain steps under the law that he could take in volunteering for the Mexican Army, but there is no evidence here that he took those steps. He submitted himself to the Selective Service of this country and he is subject to the laws of this country just so long as he had not complied with the other regulations.

Miss Zacsek: But again it is the position of the defendant that this Government provide due process for each person in this country, be he a citizen or not, and that due process of law—

The Court: Well, I do not think a person can come here when he is three years of age and enjoy the advantages of this country and then when the time comes for him to assume some of the responsibilities of a person residing in this country, cross the line and escape that responsibility [119] just as easily as you seem to indicate.

Miss Zacsek: I have not indicated that. It was the Congress of the United States that indicated that, your Honor, not me. I did not write the laws. The Congress did. I did not promulgate them. The Congress did. I did not write an opinion on those laws, Judge Peirson Hall did. I did not write the treaty. I had nothing to do with it. In fact I only found out about it after I was well under way in this case.

(Testimony of Pete G. Cervantes)

The Court: Proceed.

Miss Zacsek: Thank you.

Q. By Miss Zacsek: All right, Pete, while you were in Guadalajara did your uncle die? A. He did.

Miss Zacsek: This is leading but I am only doing it to expedite matters because it is already in the record that he died. All right, he died.

Q. Now, before his death did you have any conversation with him, or did you say to him in substance anything—

The Court: Just a moment. Conversations with the uncle I have already ruled are not admissible.

Miss Zacsek: All right.

Q. Did you after you got to Mexico—that is, to Tijuana, or Guadalajara, did you do or say anything about the United States, the draft and returning? [120]

A. I did.

Q. All right, what did you say or do during those periods of time—first in Tijuana and then Guadalajara up to the time your uncle died?

Mr. Haughton: Objected to on the ground it is incompetent, irrelevant and immaterial and even if it were there is no foundation laid as to whom he said it to. I don't know whether he was talking in his sleep or to himself or what.

The Court: Objection sustained.

Miss Zacsek: All right. It is already in the record that he did something about it.

Q. Where did you do something about it?

A. Well, I thought if I joined—

Q. Not what you thought, Pete. You have to answer the questions carefully and just as I ask them. I asked

(Testimony of Pete G. Cervantes)

you whether in Tijuana or Guadalajara at any time before your uncle's death did you say or do anything about returning to the United States to join the United States Army? Will you answer that yes or no.

A. Well, it was in Tijuana when we came over here.

Q. In Tijuana? A. That is right.

Q. After you crossed the line and before you went to Guadalajara? A. That is right. [121]

Q. What if anything did you say or do, or to whom did you say or do something about that?

A. Well, I told my uncle I want to come back right away but then he said I have no papers and the immigration is going to grab me and throw me back again to Mexico.

Q. Did you believe that?

A. I had no papers at all.

Mr. Haughton: Object to that.

Q. By Miss Zacsek: After you left Tijuana and Guadalajara did you say or do anything about returning?

A. I did.

Q. Where in Guadalajara was that?

A. Well, there in Guadalajara, in the town.

Q. With whom did you have such conversation or with whom did you have any activity in regard to that?

A. My uncle.

Q. When was that, Pete?

A. It was when we went up there to Guadalajara.

Q. When you first arrived? A. Yes.

Q. Or after you arrived?

A. When we first arrived.

(Testimony of Pete G. Cervantes)

Q. All right. How long after your arrival?

A. Right away, because I did not like the rooms or anything there, see? [122]

Q. What did you say or do?

A. I want to come back right away.

Q. All right.

The Court: You did not like the country, did you?

The Witness: No, your Honor.

Q. By Miss Zacsek: What did you say, your Honor?

The Court: I asked him if he didn't like the country and he said he didn't.

Q. By Miss Zacsek: What, if anything, happened then?

A. Well, I was investigating to see how I could come back to the United States but nobody could tell me anything.

Q. What did you do about investigating it?

The Court: Counsel, just a moment. Pete was ordered to report for induction on November 9, 1942. Now, his conduct after that time would have nothing to do with whether or not he failed to report in accordance with the order. And on Count 2, under his own statement, and I believe it was Hallowe'en of 1942 that he crossed the line, he said here he did that to get away from reporting to his draft board.

Now, the offense was completed at that time and what he did afterwards, in my point of view, is immaterial. If he intended at that time to cross the border and go into Mexico for the purpose of avoiding military service, that is when the offense was complete and when he failed to report on November 9, 1942. The offense was complete

(Testimony of Pete G. Cervantes)

at that time [123] and what he did afterwards is immaterial to the issues in this case.

Miss Zacsek: May it please the court, I have been under this impression, having represented defendants in the Federal Court during the war, when the question of the distinction between being absent without leave and being a deserter arose, and those issues I have tried in this Federal jurisdiction, and as I understood the law at that time—I will very frankly state to the court that I have not tried any such issue since then, but during the course of the war the distinction between—

The Court: Counsel, I have ruled.

Miss Zacsek: Yes, of course the court has ruled.

Well, may I say this, your Honor, for the sake of the record? I would like to introduce evidence, since it is already in the record in the exhibits, I would like to give this defendant an opportunity to explain and to give testimony in court under oath on the very things he was asked by the F.B.I. and the Department of Naturalization, because it seems to me that it is very important whether or not he made any effort to get back when he could have reported back, whether it was a day or a week or a year.

The Court: When he failed to report on November 9th, if he did fail to report on that day, wilfully and knowingly, the offense was complete, and when he left the United States [124] for the purpose of evading military service, and he testifies that was on the 30th of October, 1942, and that that was his purpose of going at that time, it becomes a question for the jury. The offense was complete and what he may have done to try to correct his error is not a matter for the jury, but it is a matter

(Testimony of Pete G. Cervantes)

for the court to take into consideration in the event that he is guilty of the offense charged.

Miss Zacsek: All right. Then I take it we will be given the opportunity, your Honor, to take this questionnaire and each of them that was submitted to this defendant by the different departments and the agents of this Government and give him an opportunity to explain them. Is that correct? Am I correct in my assumption?

The Court: If there had been an objection made to the introduction of those documents I would have sustained it. I have let a lot of material go into the record that is totally immaterial, but as long as they are in the record under stipulation I will let the witness explain them.

Miss Zacsek: I respectfully ask, may I hear the court's ruling again? I did not catch it over there.

The Court: Will the reporter read my statement?

(Statement read.)

Q. By Miss Zacsek: When you entered the United States at the border at Tijuana on the 14th of July of this [125] year, had you then been advised as to what you must do or could expect would happen to you if you came through without legal permission? A. I was.

Q. You had made a formal application for a non-quota visa from the American Consulate at Tijuana as shown by the Defendants' Exhibit B for identification, is that correct? A. That is right.

Q. Now, before that had been issued to you, that is this paper showing that your application had been denied, had you made any other formal—any other request from the American Consulate? A. I did.

(Testimony of Pete G. Cervantes)

Q. And this instrument—was that obtained by you or was that obtained by counsel for you?

A. Counsel for me.

Q. You had never been able to get one on your own before, is that correct? A. That is right.

Q. I mean they—I mean as far as even the refusal, they refused to put on paper the refusal, is that right?

A. That is right.

Q. Now, what were you told when you came to the United States? That is, before you came—if you came as to what would happen to you? [126]

A. Well, they say they are going to put me in jail or be prosecuted.

Q. What was your purpose in coming to the United States? A. Well, to get into the Army.

The Court: But you knew you might be prosecuted too, didn't you?

The Witness: That is right.

Q. By Miss Zacsek: Now, were you further advised that if you came up that you must immediately surrender to some authority of the United States Government?

A. I did.

Q. Pursuant to that advice did you, upon coming into Los Angeles, surrender? A. I did.

Q. How? By what means?

A. Well, we went down to your office. You called up the F.B.I.

Q. A little louder, please?

A. We came down to your office and you are the one that called up the F.B.I. man.

Q. When you arrived? A. That is right.

(Testimony of Pete G. Cervantes)

Q. And you waited there for them?

A. Yes. [127]

Q. And they arrived? A. That is right.

Q. After they got there did you have a talk with them? A. I did, yes.

Q. And that was in the presence of your attorney?

A. That is right.

Q. And in the presence of your brother?

A. That is right.

Q. Subsequently did you have a conversation with the gentlemen of the F.B.I. without your lawyer?

A. Yes, when we went up there to make the statement.

Q. Now you knew, did you not, that you did not have to say anything; that you had counsel and you could keep your face shut? A. That is right.

Q. But nevertheless, that it would be better practice for you to freely and fully state everything to both the Department of Immigration and the F.B.I.?

A. That is right.

Q. And so you did that? A. That is right.

The Court: And the statement you gave them was true?

The Witness: Well—

The Court: Was it true?

The Witness: Well, some of it and some of it ain't. [128]

The Court: What part is not true?

The Witness: Well, that—I have to read it again, I guess.

The Court: What is that?

(Testimony of Pete G. Cervantes)

The Witness: They didn't believe me when I told them I wanted to come here long before.

The Court: Will you read the questions and answers?
(Several questions and answers were read.)

The Court: Did you tell them as stated in the statement that you went to Mexico to evade military service in this country?

The Witness: Well, that is the first time.

The Court: Did you tell them that? Answer yes or no.

The Witness: Yes, your Honor.

The Court: Then I call your attention to this—this is your signature on Defendants' Exhibit B, is it not? Is this your signature?

The Witness: That is right, your Honor.

The Court: And you made this application, did you not?

The Witness: Yes, sir.

The Court: And you state in the application: "I claim to be exempt from exclusion on account of the class or classes noted above, for the reasons following, to-wit:

"In November 1942 I wilfully and knowingly departed from the jurisdiction of the United States solely for the purpose of evading and avoiding training or service [129] in the Armed Forces of the United States, at which time I was aware that the United States was at war. I was in receipt of induction orders before said departure. My father, my sole living parent, maintained his domicile in the United States and opposed my departure therefrom. My deceased uncle who was at that time a resident of Tijuana, lower California, Mexico, urged me to leave the United States."

(Testimony of Pete G. Cervantes)

Was that true?

The Witness: That is true, your Honor.

Q. By Miss Zacsek: Now, Pete, to the best of your ability have you told the truth with the exception of one or two things which I will point out in the next question, to all the officials of the United States Government to whom you spoke? A. I didn't catch it.

Q. Well, Pete, you said you told the truth but in some places you didn't tell the truth? A. That is right.

Q. Now, one of those things that you said that was not true was to say you were single, is that right?

A. That is right.

Q. And you lied about having a wife and having three children, isn't that right? A. That is right. [130]

Q. Why did you utter that lie, Pete, even under oath? Why did you lie about it?

A. Well, I didn't want the Government to support them.

Q. I can't hear you.

A. While I was in the Armed Forces I could take care of them without an allotment.

Q. Any other reason?

A. Well, I had a better chance of going into the Army single than when I was married.

Q. Was there any other reason at all other than what you have stated that caused you to lie about having a wife and children? Was there any other reason?

A. I want to make the thing right, what I done wrong, that is all.

Q. Well, did you think—

The Court: You mean when you came back?

(Testimony of Pete G. Cervantes)

The Witness: That is right, your Honor.

Q. By Miss Zacsek: Was that the reason you returned to this country?

A. I returned to get into the Armed Forces.

Q. Now, Pete, when you said that you didn't want the Government to support your children, what do you mean by that?

A. Oh, the F.B.I. or the Government will think that I want the Government to support them so I could go into the Army. I didn't want them to think that. She could get along [131] until I come out of the Army.

Q. What do you mean, support—allotment? You mean that which the Government gives to wives and children?

A. That is right.

Q. And you didn't want them to think that?

A. No.

Q. Pete, when was the first time that you heard from anyone about the provisions that were made in the Selective Service regulations about co-belligerent aliens?

A. I didn't hear it.

Q. What? A. I never did.

Q. Well, you learned about it since you have been in the United States, haven't you?

A. That is right.

Q. And from whom did you first hear it?

A. From you.

Q. And that was after you came into this country and surrendered, is that right?

A. That is right.

Q. Now, in this questionnaire, Pete, you have used the word "Mr. Eugene" on several occasions. When you refer to Mr. Eugene who was the person that you referred to? What was his correct name, if you know?

A. Eugene Corteau, Senior. [132]

(Testimony of Pete G. Cervantes)

Q. Have you had the habit in the past of referring to Mr. Corteau as Mr. Eugene or Mr. Gene?

A. Well, he used to—he told me to call him Gene or Mr. Gene.

Q. And when your brother Salvador refers to any person as Mr. Gene in connection with this case as far as you know he refers to Mr. Corteau also?

A. That is right.

Q. When did you first contact Mr. Corteau? That is, when did you first contact Mr. Eugene?

A. April 1945.

Q. And at that time, in April 1945, what if anything did you—what was the purpose if any of your contacting him?

Mr. Haughton: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Miss Zacsek: All right, your Honor.

Now here is what evidently appears to be a typographical error and I would like to clean it up. It is People's Exhibit No. 10 on page 4. It says—the question and answers are as follows:

“Q. What was your purpose in remaining in Mexico for that period of time?

“A. Well, I had no immigration to come across [133] at that time, and I didn't have no papers to come across until I met Mr. James from Local Board 165 at San Ysidro, and he said he was going to help me.”

Now, when you referred to Mr. James I take it it may be conceded that you meant Mr. Gene?

A. Mr. Gene.

(Testimony of Pete G. Cervantes)

Q. And by Mr. Gene you meant Mr. Corteau?

A. No, his name is Jean Corteau. He is the same person we are talking about.

Q. Then this Mr. James is evidently a typographical error.

Mr. Haughton: It might be, counsel. I don't know that it makes any difference, or if it will be any help to you I will stipulate he meant Mr. Gene.

Miss Zacsek: Thank you. I will accept that stipulation.

Q. Now, when you said to Mr. McDonald, I think it was, of the Immigration Board, or Mr. McFadden, when he said, "What was your purpose in remaining in Mexico for that time" and you said, "Well, I had no immigration papers," will you explain to us and clarify for us what you meant when you said that you had no papers to come across until you met Mr. Gene? A. Well—

The Court: I think it is self-explanatory, counsel. [134] He did not have the legal authority to cross the border. That is what he meant. I think that is clearly understandable. Isn't that what you meant?

The Witness: Yes, your Honor.

The Court: You could not get across the border without papers, could you?

The Witness: No, your Honor.

Q. By Miss Zacsek: Well, Pete, why couldn't you get across the border at any time during while the war was on?

A. They refuse a visa every time I used to go to a consul. One time they almost kicked me out.

(Testimony of Pete G. Cervantes)

Q. Well, Pete, there was the back door which you finally took in July of this year. Why didn't you try the back door in 1943 or 1944 or the spring of 1945?

A. Will you repeat that, please?

Q. Yes, I will reframe the question. There is such a thing as slipping across the river or coming through the river bed or coming in the back door and so forth, isn't there, to cross the border?

A. That is right.

Q. Well, during the war and when you were at Tijuana you first contacted Mr. Corteau but why didn't you take that river bed road if you were so determined to get back to the United States?

A. Well, there is a chance to get killed over there on [135] the border.

Q. What do you mean by that?

A. There are a lot of immigration officers, Federal men, all guarding the border there.

Q. What makes you think they would shoot you?

A. They killed a couple of boys over there trying to come across.

Q. Did you know that?

A. Well, it came out in the paper. I wasn't there when they killed them.

Q. Now, this statement that you gave to the F.B.I., Pete, this two sheets, does that contain the whole story as you remember we talked about in my office at the time those gentlemen were there with you?

A. Yes.

The Court: You will have to speak up. Nobody can hear you. What was your answer?

The Witness: Yes, it was.

Q. By Miss Zacsek: What?

A. Yes, it was.

(Testimony of Pete G. Cervantes)

Q. What I am trying to say, Pete, was anything else said on this subject by yourself and the gentlemen of the F.B.I. while you were in my office with Salvador that does not appear here?

A. Well, my uncle's story. [136]

Q. All right, your uncle's story which was told them does not appear here, is that right?

A. I don't think so.

Q. What? A. I don't think so.

Q. All right. This is not your handwriting, is it?

A. No.

Q. In other words, what happened was this: You talked with the F.B.I. gentlemen—

The Court: Just a moment. Do not be too leading in your questions. He is your witness.

Miss Zacsek: All right, thank you.

Q. You remember in substance, do you not, the conversation in my office with these gentlemen when they came to my office in response to a call? A. I do.

Q. Now, when you were with them alone did you go over the same ground again with the same people?

A. No, another man.

Q. Did you cover the same ground then with the other gentlemen that you covered in my office? A. No.

Q. What? A. No.

Q. I don't understand you. [137]

A. Well, I mean—

Q. Pete, there was—I am trying to direct your attention to the first conversation in my office. Now, that conversation was along lengthy and detailed conversation, is that right? A. That is right.

(Testimony of Pete G. Cervantes)

Q. Now, when you were in the office of the gentlemen of the F.B.I., with Mr. Kachelhoffer, did you have with him in substance the same conversation that you had with the gentlemen in my presence? A. I did.

Q. Now, as far as you know did they leave anything out when they made out this paper that you talked about, or do you even know what is in this paper, Pete? Do you want to look at it? You had better read this first before you try to answer.

The Court: Proceed, counsel.

Miss Zacek: All right.

Q. Now, Pete, does this contain the whole story?

A. Well, it doesn't say there that I want to come when the shooting was on.

Q. Then it does not contain the whole story, is that right? A. That is right.

Q. It is only true in part? [138]

A. That is right.

Q. What is here is reasonably true and what isn't here has been left out? A. Yes.

Q. Now, what I am getting at is this, Pete: Did you tell the Government F.B.I. agents anything about yourself that is not put down here?

A. Well, I told them that I was single but they look at the record and find out I was married.

Q. I mean outside of that. You just now got through saying, "while the shooting was going on." Will you tell us what you said to them in this conversation that they did not put down on this paper?

A. Well, I guess they didn't ask me if I want to come when the shooting was on. I told them I was when the

(Testimony of Pete G. Cervantes)

shooting was on but they didn't write it down to the paper.

Q. Pete, your mumbling—you are incoherent. I know what you are trying to say, but it doesn't make sense to me even now.

The Court: Read the answer.

(Answer read.)

Q. By Miss Zacsek: You told them you wanted to come back while the shooting was on?

A. That is right.

Q. And they did not put that down here? [139]

A. No.

Q. All right. You mentioned before something about the uncle before you read this. Did you have a talk with them about the uncle? A. I did.

Q. And that was not put down on this paper?

A. That is right.

Q. What did you tell them about that, that they didn't put down? A. That is right.

Q. What did you tell them?

A. I told them my uncle came for us and took us over there to Mexico.

Q. All right. Is that all you told them?

A. I told them that I want to come here and join the United States Army. That is my main reason for being over here.

Q. All right. Now, in relation to this statement you knew that you by law were protected so that you didn't have to talk to them or anybody else or tell any of the F.B.I. officers anything, isn't that true?

A. That is right.

(Testimony of Pete G. Cervantes)

Q. You were also told that if you wanted to talk to them and tell them the truth in its entirety that you were free to do so? [140] A. That is right.

Q. And you elected to talk to them freely?

A. That is right.

Q. Now, the statement was made in the other questionnaire at the Department of Immigration and Naturalization and the reference was made to your arrest and you quote yourself or you referred to yourself as saying, "When I was arrested". All right, you were arrested. Now will you explain the circumstances of your arrest?

The Court: What materiality is that? I assume it refers to the same arrest he is under trial for now, does it not?

Miss Zacsek: No. It refers to the method—it does, yes, but it refers to the method of the arrest of which there is some testimony in the record now and I would like to complete it.

The Court: The method of arrest is immaterial.

Miss Zacsek: All right. Then I will say, where were you taken into custody?

A. Well, we were down at your office and you called up the F.B.I. man.

Q. And they came in?

A. They came in and took us to the County Jail.

Q. And you went with them? A. That is right.

Miss Zacsek: May I respectfully inquire when the court [141] adjourns?

The Court: I was wondering if you could complete your direct examination. Are you nearly through?

Miss Zacsek: Well, yes, nearly through. There are one or two questions that I still have.

The Court: The only thing is if I give you over night you will have more than one or two.

Miss Zacsek: That is quite true, your Honor.

The Court: Well, it is 4:30 and the jury has had a pretty long day. We will take a recess at this time until ten o'clock tomorrow morning. The jury will bear in mind the admonition the court has heretofore given. You must not discuss this case among yourselves, or permit any person to discuss it with you or express or form any opinion until the case has been finally submitted to you.

With that we will take a recess until ten o'clock tomorrow morning, and I desire to see counsel in chambers.

(Whereupon, at 4:30 o'clock p.m., a recess was had until 10:00 o'clock a.m., Thursday, October 31, 1946.) [142]

Los Angeles, California, Thursday, October 31, 1946
10:00 a.m.

(Case called by the clerk.)

The Court: Will you stipulate the jurors are all present and in the jury box and the defendants are present in court with their counsel?

Miss Zacsek: So stipulated, your Honor.

Mr. Haughton: Yes, your Honor.

The Court: You may proceed.

Miss Zacsek: Pete, will you take the stand?

PETE G. CERVANTES,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Miss Zacsek:

Q. Now, Pete, I am going to direct your attention to the conversations you had with Jean Croteau and ask you what if anything he said relative to your delinquency?

Mr. Haughton: Objected to as incompetent, irrelevant and immaterial.

The Court: Read the question.

(Question read.)

The Court: Objection sustained.

Miss Zacsek: May it please the court, may counsel [146] approach the bench?

The Court: I do not think there is any occasion to approach the bench.

Miss Zacsek: Well, I don't like to urge an offer of proof in front of the jury and there was something in the regulations which I had ascertained only this morning, and I am having, as I indicated to the court—

The Court: But, counsel, I take the position, and if I am in error the Circuit Court will correct me, that any question of his delinquency is a matter for the court to pass upon if there is a conviction and in the event of pronouncing judgment. That is a matter that would be in mitigation. The offense is completed under Count 1 when the defendant failed to report for induction and under the second count when he left the United States, if he did leave the United States and if they left for the

(Testimony of Pete G. Cervantes)

purpose of evading service in the military forces of the United States the offense was complete and anything they did in the way of trying to rectify any error, if they did commit an error, would be simply a matter in mitigation which matter is not before the jury.

Miss Zacsek: May it please the court, if I may call the court's—I haven't the law with me. It is in the stenographic department in this building. As I said, I am having it typed up by way of an instruction, but I ascertained this [147] morning in the regulations, the law says it is the duty of a delinquent to report from day to day regardless of the circumstances or why or how the registrant failed to report for induction. Nevertheless it is the duty to continue and that duty is imposed by law from day to day.

The Court: He is not charged with that in this case. If he was charged with failing to perform a duty in that he failed to do that, that would be material, but it is not included in any of the charges in this indictment.

Miss Zacsek: Well, I beg the court's pardon. I have been of the understanding that Count 1 is the failure to report for induction knowingly. If that be true then this law which I propose to submit to the court as soon as I can have it accomplished is important.

The Court: Well, the court has ruled.

Miss Zacsek: Thank you. Then that is all, thank you. You may take the witness, Mr. Haughton.

Cross Examination

By Mr. Haughton:

Q. Mr. Cervantes, did you ever at any time make any request of your Local Board 199, for permission to serve in the Armed Forces of Mexico?

A. Well, they never did ask me.

(Testimony of Pete G. Cervantes)

The Court: Did you make such request?

The Witness: No, I did not. [148]

Q. By Mr. Haughton: Did you ever serve in the Armed Forces of Mexico? A. No, I never did.

Mr. Haughton: That is all.

Redirect Examination

By Miss Zacsek:

Q. Did you know that you had the right as a matter of fact to ask to be transferred to the Army of your own land?

Mr. Haughton: Objected to as incompetent, irrelevant and immaterial.

The Court: I will let him answer the question.

A. No.

Q. By Miss Zacsek: When you volunteered into the Army were you accepted into the Armed Forces of Mexico? A. Yes.

Mr. Haughton: Just a moment. May I ask that the question be stricken for the purpose of making an objection?

The Court: Well, it has been asked and answered. I cannot strike it out.

Mr. Haughton: Very well, sir.

Q. By Miss Zacsek: All right. Did you under the enlistment which you—strike that, please.

Will you please explain to us what your position was in the Mexican Army and the Army itself in relation to this war? [149]

Mr. Haughton: Objected to. That is calling for a conclusion of the witness and is incompetent, irrelevant and immaterial.

(Testimony of Pete G. Cervantes)

The Court: Objection sustained.

Q. By Miss Zacsek: In other words, then, just to clarify it, you have testified that you volunteered and were admitted into the Mexican Army, is that right?

A. That is right.

Q. But you did not actually serve in the war, is that right?

A. That is right.

The Court: You did not serve in the Mexican Army, did you?

The Witness: No.

The Court: All you did was register with them, isn't that right?

The Witness: Well, I volunteered in the Mexican Army.

The Court: You registered similarly as you did here?

The Witness: I volunteered.

Q. By Miss Zacsek: Is there a distinction in Mexico between volunteering and being registered and drafted?

Mr. Haughton: Object to that as calling for a conclusion on the part of the witness and being a matter of law.

The Court: Objection sustained, on the ground it calls for a conclusion of the witness. [150]

Q. By Miss Zacsek: As far as you knew did you have a personal choice of registering or a personal choice of volunteering into the Army?

Mr. Haughton: Object to that.

The Court: Objection sustained on the same ground. The court will direct the witness not to answer the question.

(Testimony of Pete G. Ceryantes)

Q. By Miss Zacsek: What was your position as far as you knew after you had volunteered for service in the Mexican Army?

Mr. Haughton: Object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. By Miss Zacsek: When you left Guadalajara for Tijuana, did you do anything about your Army status at that time?

Mr. Haughton: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Miss Zacsek: No further questions.

The Court: You stated that you received your notice to report for induction here in the latter part of October 1942?

The Witness: That is right, your Honor.

The Court: And you received a notice to report on November 9th, didn't you? [151]

The Witness: That is right, your Honor.

The Court: And you immediately quit your job?

The Witness: No, I was really going into the Army, your Honor.

The Court: But you quit your job here?

The Witness: Yes.

The Court: And you crossed the border on Hallowe'en Day, I believe you said. You went back to Mexico on Hallowe'en Day?

The Witness: That is right, your Honor.

(Testimony of Pete G. Cervantes)

The Court: And when you did that you knew that and your purpose for doing it, was to not comply with the order to report for induction?

Miss Zacsek: That question is objected to, may it please the court, and I object to it being propounded to this witness on the ground it calls for an opinion and conclusion.

The Court: The objection will be overruled.

The Witness: Well, I got up there and I registered right away with the Mexican Army.

The Court: You registered in December, didn't you?

The Witness: December? Yes, your Honor.

The Court: But when you left the United States, if I remember correctly your testimony, you said you were not feeling well, you were sick and you were in debt? [152]

The Witness: That is right.

The Court: And you wanted an extension?

The Witness: That is right.

The Court: And when they wouldn't give you an extension you went to Mexico?

The Witness: That is right, your Honor.

The Court: That is all.

Miss Zacsek: That is all.

Mr. Haughton: No questions.

Miss Zacsek: Salvador Cervantes, will you take the stand?

SALVADOR G. CERVANTES,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Salvador G. Cervantes.

Direct Examination

Miss Zacsek: With the court's permission I will ask the preliminary foundation questions by way of leading questions in order to expedite matters, if that is agreeable with the court.

Q. By Miss Zacsek: Salvador, I take it you came into this country with your family when you were about one year old, is that right? A. Yes. [153]

Q. And you and your family came to Los Angeles at that time and you stayed here continually all those years, is that correct? A. Yes.

Q. And I take it further as far as you know you were born in La Barca, in Jalisco in the Republic of Mexico, is that right? A. Yes.

Q. And also as far as you know and can recall you were brought here, your father and your sister and your brother, by and with your uncle who was your father's brother, is that right? A. Yes.

Q. And as far as you know your father was at all times a Mexican National or citizen? A. Yes.

Q. And to your best knowledge he was never a citizen of the United States? A. No.

Q. Now, Salvador, during your lifetime as you grew up what was your mental relation to your brother Pete?

(Testimony of Salvador G. Cervantes)

Mr. Haughton: Object to that as incompetent, irrelevant and immaterial.

Miss Zacsek: It goes to his intent.

The Court: I am going to overrule the objection. If [154] he has an explanation for his conduct I want to hear it. I want him to have a full opportunity to explain it.

Q. By Miss Zacsek: Did you understand the question, Salvador? A. Yes.

Q. Will you answer it, please?

A. Well, being my older brother I used to do what he used to tell me all the time, and every time he used to go somewhere I went.

Q. A little louder.

A. Well, he is the older brother and I had to respect him because he was my older brother and I had to do what he told me to do.

Q. Well, did you do what he told you to do?

A. Yes.

Q. All your life? A. Yes.

Q. Did you ever have during your lifetime any feeling other than dependency upon your brother's orders?

A. (No answer.)

Q. Do you understand that question?

A. No, I don't.

Q. All right. This is going to be a little difficult, too. I don't want to lead unnecessarily, your Honor. [155]

The Court: Well, don't make an explanation; ask your questions.

(Testimony of Salvador G. Cervantes)

Q. By Miss Zacsek: Did you through your lifetime, Salvador, develop a habit of being dependent upon Pete?

A. Yes.

Q. Did you ever do very much in your lifetime on your own account of anything that was ever important without consulting Pete?

A. No, everything I used to do I used to consult my brother about it and see what he told me.

Q. Now, in your family and as you were brought up, Salvador, how did you act toward your uncle?

Mr. Haughton: Object to that as immaterial—incompetent, immaterial, and irrelevant.

The Court: Let him answer the question.

A. Well, my uncle was—he used to be—he used to be the head of my family even over my father. He was the one that directed my family.

Q. By Miss Zacsek: Louder.

A. My uncle was the head of the family over my father so he used to tell what to do.

Q. Even told your father what to do? A. Yes.

Q. Did your father mind him the way you minded Pete? A. No. [156]

Q. Do you understand that question, Salvador?

A. No, I don't.

Q. When I say "mind" I mean obey. In other words, if your uncle told your father to do something did your father do it? A. Yes, sir.

Q. The way you would do whatever Pete told you?

A. Yes.

Q. Well, is that a custom in your family, that the older brothers tell everybody else what to do?

A. Yes.

(Testimony of Salvador G. Cervantes)

Q. All right. Now, Salvador, how old were you when you registered for the draft?

A. I was, I think, 19 then.

Q. Now, Salvador, I am going to show you People's Exhibit No. 2, which is the Selective Service questionnaire dated October 26th, 1942, and ask you whether this is your signature? A. Yes.

Q. When and where did you fill out this questionnaire and put your signature on this document? Do you remember that?

A. Well, I don't remember the date or anything about it. I know that is my signature. I don't know who filled it out for me. [157]

Q. Well, do you remember where it was filled out, Salvador? A. I think it was up on Boyle Street.

The Court: At the Selective Service Board?

The Witness: No, it wasn't. It was—I think it was one of the men that fill out papers.

Q. By Miss Zacsek: Do you know if it was the Advisory Board or some member of the Advisory Board?

A. No; it was nobody of the Board.

Q. Do you know if it was a notary public?

A. I think that is what it was.

Q. But you are not sure? A. I am not sure.

Q. Now, you notice that all of the questions that had to be filled out and were filled out were done in type writing. Will you explain to us why or how it happened that this is in typewriting? Did you type it up?

A. No, I didn't.

Q. Can you type? A. No, I can't.

(Testimony of Salvador G. Cervantes)

Q. All right. And how did it happen that that is typewritten?

A. Unless that man filled it out but I don't know what was in it.

Q. The man filled it out? [158] A. Yes.

Q. He asked you questions and you answered them, is that right? A. That is right.

Q. And then he typed it down? A. Yes.

Q. Now, Salvador, I notice here where it says "Citizenship", No. 4, there is a check on there in red pencil and red pencil or red crayon is used to write the words "am not." In other words, the printing is, "I..... a citizen of the United States," and in red it says, "I am not a citizen." There is a red check in front of that. That is the only handwriting on this instrument other than the ink writing with the number of your alien registration. Now, do you remember anything at all, Salvador, as to how the red crayon words "am not" got into that record?

A. I didn't put nothing down, not even the red pencil.

Q. You didn't put that down? A. No, I didn't.

Q. Did you fill out that ink number of your alien registration? A. No, I didn't.

Q. Did you look at that paper and read it carefully before you signed it, Salvador? A. I didn't. [159]

Q. Do you now know whether or not the red ink or red crayon writing and the ink writing was on that paper before you signed it and swore to it?

A. Well, I didn't look at the paper when I signed it.

Q. So you have no knowledge of anything?

A. No.

(Testimony of Salvador G. Cervantes)

Q. Well, did you look at it afterwards, after you signed it?

A. No, because the man got it and put it inside of an envelope and mailed it. That is all he told me. That was all.

Q. All right, at the time that you were asked the questions I take it that whoever this man was he asked you where you were born, is that right? A. Yes.

Q. And did you answer La Barca, Jalisco, Mexico?

A. Yes.

Q. And he asked you when you were born?

A. Yes.

Q. And you told him and he put that down. You were born December 11, 1922, is that right? A. Yes.

Q. And did he ask you whether or not you were a citizen of the United States? Do you remember that?

A. Yes, he did. [160]

Q. And did you tell him you were or you were not?

A. That I was not.

Q. And did you tell him that you were a citizen or a subject of Mexico? A. Yes.

Q. Did you give him your alien registration number?

A. Yes.

Q. Did you tell him you did not file a declaration of intention to become a citizen?

A. Yes, I told him that.

Q. Now, after you left this man and he put the paper in an envelope as you have told us, that was as far as you did anything about registering at that time, is that right?

A. That is right.

(Testimony of Salvador G. Cervantes)

Q. Now, there are two exhibits here, your registration card, and I show you here People's Exhibit No. 1, which is a registration card bearing your name on it and bearing a signature. Is that your signature? A. Yes.

Q. When and where did you first see this?

A. Well, the first time I seen it was here in court.

Q. But that is your signature, Salvador?

A. Yes, that is my signature.

Q. Did you sign it in court?

A. No; I went down to the Roosevelt Building High [161] School. There is where I filled it out.

Q. Then you saw it before? A. Yes.

Q. And who told you to go to the Roosevelt High School to fill it out, Salvador?

A. Well, it came out in the papers that all of a certain age had to register by a certain time.

Q. And you went down? A. And registered.

Q. And signed that? A. Yes.

Q. Now, as far as those two matters are concerned, your registration and filling out the questionnaire, did you have any other words from the Government, word from the Selective Service Board that you know of before you went away? A. No, that is all I received.

Q. Now, Salvador, this uncle of yours that has been testified to, left your home around 1932 and then he came back and visited you from time to time, is that right?

A. Yes.

Q. And toward the end—before you and Pete left it is in the record that he had been or he came to your home from time to time and argued or urged Pete to go away. Now, were you present at any of those arguments or conversations? [162] A. No.

(Testimony of Salvador G. Cervantes)

Q. You don't know or you didn't hear then what your uncle said to Pete or what he replied? A. No.

Q. Did anybody in your family talk to you about what the uncle told Pete? A. No, they didn't.

Q. Well, then, will you please tell us in your own words how it happened that you went with Pete?

A. Well, Pete had received some papers and then my uncle at that time came over and said that we had to go to Mexico, so my brother, he was sick at that time, he had a wreck and knocked all his teeth down and everything and was very nervous. He had a lot of headache, too. My uncle told him, "You don't feel good," so he went with my uncle and I went along with my brother. I didn't know I was doing anything because I only registered and received no papers at all.

Q. Well, at the time that you went did you have in your mind, did you think, Salvador, that you were violating some rule or law? A. No, I didn't.

Q. At that time when you left did you have any conversation yourself with the uncle?

A. No, I didn't. They didn't talk to me. [163]

Q. Didn't talk to you?

A. My uncle used to talk to my brother, that is all.

Q. Well, did Pete tell you anything before you left?

A. No, he didn't tell me anything.

Q. You just tagged along? A. Yes.

Q. What did you tag along for, Salvador? Why? Can you tell us now what made you go with Pete and your uncle?

A. I don't know. It is all the time my brother used to go somewhere. We used to go together. Everywhere

(Testimony of Salvador G. Cervantes)

we used to go together, so I just used to follow my brother where we used to go.

Q. All right. Now, did you receive any notice of classification on October 8, 1943? A. No, I didn't.

Q. Did you ever receive any order of induction at all?

A. No, I didn't receive no papers at all.

Q. Now, when you went to Mexico with Pete did you know that you were unlawfully evading the law of the United States and the provisions of the Selective Service Act? Do you understand that question? A. Yes.

Q. All right. A. No, I didn't.

Q. Did you leave for Mexico knowing that by going [164] across you did it for the purpose of evading service in this country?

A. I didn't because I only had this paper and I didn't know anything about the rest.

Q. All right. Now, you said something a moment ago about reading in the papers about what you were supposed to do. Is that right? A. Yes.

Q. Did you have any thought in your head then, any idea from reading the papers, the age that the Army was calling men—

A. Well, some friend of mine used to say only the 21-year-old boys were going in the Army.

Q. Did you believe that? A. Yes, I did.

Q. All right. Did you have any idea what was, if anything, going to happen after you went from home with your uncle? Did anybody tell you anything? I mean, did you yourself have any idea, Salvador, what you were doing or where you were going or what was going to happen? A. No, I don't.

(Testimony of Salvador G. Cervantes)

Q. You just tagged along, is that right?

A. Yes.

Q. I take it that you went with him, your uncle, in a car and you went through the line in Tijuana? [165]

A. Yes.

Q. Did you say anything to anybody when you crossed the line, to any American official?

A. No, I didn't.

Q. Did you say anything to any Mexican official at the border? A. No.

Q. All right. Now, after you got—was that the first time you had ever been in Tijuana? A. Yes.

Q. Were you present when Pete said, as he told us here from the stand, that he didn't like Mexico and he wanted to go home?

A. Well, he told me that, that he wanted to come back.

Q. I know, but, Salvador, I did not ask you what he told you. Listen just carefully to the question, please. The question is this, Salvador—did you—were you present when Pete and your uncle had a talk in which Pete said, "I don't like it here; I want to go home" or words to that effect? A. No, I wasn't.

Q. Did Pete tell you anything about wanting to go home? A. Yes, he did.

Q. Where was that, Salvador? [166]

A. That was in Tijuana.

Q. How long had you been in Mexico then?

A. I don't know.

Q. Well, were you there a day or a week or a month before he said that? Have you any remembrance?

A. I don't know how much time we stayed there.

(Testimony of Salvador G. Cervantes)

Q. Well, do you remember where he told you that?

A. No, I don't.

Q. Well, when he said he didn't like it what else did he say if he said anything?

A. Well, he said that he had told my uncle that he was coming back so my uncle told him he couldn't come back any more. He said he had no papers to come across or anything to get across with.

Q. Well, after you got to Mexico how did you feel about it?

A. Well, I was just with my brother. What he did I used to do. That is all.

Q. Well, did you have any feeling about Mexico one way or the other? A. No, I didn't.

Q. All right. When Pete told you this what, if anything, did you say? Did you say anything?

A. No, I didn't.

Q. All right, were you present at any time while you [167] were in Tijuana at any conversation Pete had with the uncle? A. No, I didn't.

Q. Well, then, I take it you went to Guadalajara?

A. Yes.

Q. With the uncle and Pete? A. Yes.

Q. Do you remember anything about the date when you got to Guadalajara?

A. Well, I know it was in December because when we volunteered they put the date on it.

Q. That is how you remember it? A. Yes.

Q. Now, did you have any talk with the uncle or with Pete or either one of them alone or together about going into the Mexican Army?

(Testimony of Salvador G. Cervantes)

A. Well, my brother told me that we had to volunteer in the Mexican Army because they were fighting for the same cause that the United States was, and that it would be the same thing if we got in the Mexican Army and waited for orders there.

Q. When did Pete tell you that?

A. The day before we volunteered in the Mexican Army.

Q. And did you believe him?

A. He told me, so I believed him.

Q. And did you volunteer? [168]

A. Yes, we did.

Q. Because he told you that it was the same thing as here?

A. Yes.

Q. All right. Well, after you volunteered were you accepted?

A. We were.

Q. Did the Army then put you to work in the Army or did they tell you to wait?

A. They told us to wait for further orders, that is all.

Q. For further orders? A. Yes.

Q. I take it from the record that you know—heard that your uncle died shortly after you got to Guadalajara? Is that right?

A. Yes.

Q. Do you remember how long after you volunteered into the Army that your uncle died?

A. No, I don't.

Q. Can you think at all, Salvador, whether it was weeks or months?

A. I am not sure whether it was weeks or months. I don't know the date.

Q. Do you remember when he died, Salvador? [169]

A. No, I don't.

(Testimony of Salvador G. Cervantes)

Q. After he died did you have a talk with Pete about what to do next?

A. Pete told me he was—he is the one who did all the talking.

Q. Well, what did Pete say to you?

A. Well, he told me that there was no action over there and the best thing we can do is come back to Tijuana and try to cross the border and get in the American Army.

Q. What do you mean by “no action over there”?

A. Well, because the United States wouldn't need the Mexcan people to go fight with them.

Q. There was no action in Mexico? A. Yes.

Q. All right, what did you say to Pete, if anything?

A. I didn't say anything to him.

Q. Don't you ever reply to Pete when he talks to you?

A. No.

Q. All right, Salvador. Then after Pete told you he was going to try to get into the American Army through Tijuana what was the next thing that happened to you two boys? What did you do? What happened then?

A. Well, my brother was the one—

Q. A little louder, please. Try to speak louder, Salvador. I am having an awful time hearing you. [170]

A. My brother did all the talking. He was getting information for all things, from all different kinds of people to find a way to come across.

Q. You did not accompany him? A. No.

Q. Well, when he would come home what did he say about what he had tried to do?

A. Well, he used to say that the people say that being a Mexican if you come over here the only thing they can

(Testimony of Salvador G. Cervantes)

do is put you in jail and throw you back over there. That is the only thing they can do and told him to forget about it.

Q. All right. You went with Pete to Tijuana. You went back to Tijuana with Pete, is that right?

A. Yes.

Q. All right. Now, when you were in Tijuana did you go with Pete anywhere, to any offices, of any notaries or lawyers or counsellors or anyone—immigration?

A. Well, I used to go with him but he is the one that does all the talking there. I used to stay outside.

Q. You didn't go inside with him? A. No.

Q. You know the offices where Pete went?

A. Well, he went to some notary publics and to the American Consul.

Q. When he would come out of those offices did he talk [171] to you about what happened inside?

A. Well, yes. They used to tell him they couldn't do anything about it. The only thing they can do if he came across was put him in jail. That is all.

Q. Did Pete say why he went to the different offices and to the consul?

A. He wanted to get some information about crossing the border and getting into the American Army.

Q. After Pete found out he couldn't get across what did you boys do then?

A. Well, after my brother tried a lot of times to get across—

Q. Look, Salvador, do you want these gentlemen to hear what you are saying? A. Yes.

Q. Are you interested in having somebody hear what you have to say about this trial? A. Yes.

(Testimony of Salvador G. Cervantes)

Q. Well, if you don't talk up nobody is going to hear you, Salvador. I can't go on struggling with you any more. Please shout. Can you shout? You are a big boy. Shout, **really**.

A. Well, my brother after talking to all those people in there and telling them—telling him they couldn't do anything about it; the only thing they could tell him to [172] do was to go in business on his own and forget about the United States, so my brother got some kind of business started working there and then he told me to go to work so I started working there.

Q. All right. Now, around the spring, April of last year, Jean Croteau came into the life of Pete, is that right?

A. Yes.

Q. Do you know anything about how Pete and Jean got together?

A. I think some friends went up to Jean's house and told him about Pete and Mr. Jean went up to Tijuana and talked to my brother about it.

Q. Were you present when Mr. Jean talked to Pete?

A. No, I wasn't.

Q. Were you present at any of the conversations which Pete had with Jean?

A. No, I wasn't.

Q. Well, Salvador, tell us in your own words why it is and how it happened that whatever was done about Pete getting back or going into the Army or anything else, that you never were present and only heard about it after Pete got through talking?

A. Well, my brother was the one that was doing all the informing and talking to Mr. Eugene and Mr. Eugene would [173] fix some kind of papers together for us to go

(Testimony of Salvador G. Cervantes)

in the American Army, so I was always just waiting for my brother. I knew if Eugene can fix my brother I go with him. It would be the same thing.

Q. Were you around Pete when he wrote any of the letters that he sent up to his Board?

A. No, I wasn't.

Q. Were you around when he received any letters from Mr. Eugene? A. No, I wasn't.

Q. Did Pete talk to you from time to time about what was happening between Gene and himself, about the Army?

A. No, he just told me some letters he had received, that he sent, that is all.

Q. All right. Now, Salvador, you finally went into the American Consulate in July with Pete and myself, is that right? A. Yes, sir.

Q. And before then you say Pete had gone there a few times to try and get papers and they wouldn't do anything, is that right? A. That is right.

Q. Then you were told, "Well, no matter what happens at least you had better get a paper to show that you had tried to come back," is that right? [174]

A. Yes.

Q. So you went in and saw Mr. Witte?

A. That is right.

Q. That is after I talked to Mr. Witte?

A. That is right.

Q. You don't know what I told Mr. Witte?

A. No.

Q. Then you went in and made out some papers?

A. That is right.

(Testimony of Salvador G. Cervantes)

Q. And you signed them? A. Yes, sir.

Q. And Mr. Witte gave you a paper which said you could not come in no matter what?

A. That is right.

Q. You were told in substance that if you came back to this country you would have to surrender yourself and stand trial, is that right? A. Yes.

Q. And you were also told that maybe the Army might take you and maybe they wouldn't, is that right?

A. Yes.

Q. That the only way you could find out even at this late date was to come back and find out?

A. That is right.

Q. But if you came back you were strictly on your own, [175] is that right? A. Yes.

Q. And you had to surrender the moment you came back to this country? A. Yes.

Q. Well, I take it you and Pete both came through the back door so to speak, of the border, is that right?

A. Yes.

Q. And you came to my office and I telephoned the F.B.I. and they came up and you talked to them?

A. Yes.

Q. And they wrote out something and you signed it?

A. Yes.

Q. Then you went to the Department of Immigration and you had a talk with the gentlemen there?

A. Yes, sir.

Q. And they took down what you said?

A. Yes.

(Testimony of Salvador G. Cervantes)

Q. And when you talked there, Salvador, you kept telling them about your brother Pete and then you said the only reason you went was to avoid going into the Army and you said one thing one time and one thing another time. Why did you say so many things that were contradictory?

A. I couldn't understand most of the questions he used. He used some big words. I didn't know what it was, so the [176] first thing that came to my head that is what I used to answer.

Q. Well, Salvodar, you have talked to me as your lawyer a lot of times since then, haven't you? Since you have been here and in jail and since this matter has come up?

A. Yes.

Q. And you had it explained to you what this is all about and what you are charged with?

A. Yes.

Q. Now, I am going to ask you point-blank, Salvador, and you have had a great deal of time to think and try to remember, is that right?

A. Yes, sir.

Q. Now, Salvador, once more I am going to advise you that you are charged in the first count that in 1943 you failed to report for induction into the Armed Services, and that you did that wilfully and knowingly; that you had been ordered and notified to report and you didn't do it. Now, did you know you were supposed to?

A. Well, I didn't know. I didn't receive no papers at all. How could I report?

The Court: When you left here did you let your father know where you were going?

The Witness: No. At the time we left we didn't know [177] where we were going.

(Testimony of Salvador G. Cervantes)

The Court: Did you write to him?

The Witness: No, I did not.

The Court: You did not leave any address?

The Witness: Well, the only address was where we were still living, at the same address.

The Court: Where your father was living?

The Witness: Yes, sir.

The Court: So any mail that was sent to you at that address he did not send on to you?

The Witness: Well, at the time he didn't know where we were at, so I didn't leave no address because it was the same address. I didn't know nothing about that.

Q. By Miss Zacsek: After you got back to Tijuana, that was in the beginning of 1943, was it not?

A. Yes.

Q. Well, after that you told your family where you were, didn't you? A. Yes.

Q. And they knew where you were? A. Yes.

Q. And they came to see you, didn't they?

A. Yes.

Q. All right. Did anybody after you settled then and got your job in Tijuana and after you were in communication [178] with your family, did anybody tell you about your order?

A. No. The only thing they told me about was that classification. That is all the papers that I received.

Q. The classification? A. Yes.

Q. Do you know what that was?

A. Well, I don't know—it was 1-A—I didn't know what it was.

(Testimony of Salvador G. Cervantes)

Q. Now, at any time from the beginning of 1943, because your uncle died in the beginning of the year, didn't he, soon after you were in the Army?

A. Yes.

Q. Of Mexico? A. Yes.

The Court: Just a moment, counsel. He never testified he was in the Army. That is a misleading question.

Miss Zacsek: That is just it. I don't know how to bring it in front of this court except through these—

The Court: The only thing is you are making a statement that the witness has not testified to and you are assuming something that is not in evidence.

Miss Zacsek: I am sorry. I will withdraw the question and reframe it.

Q. Salvador, after you volunteered for the Army you said that Pete said you were not getting any action and you [179] wanted to come home?

A. That is right.

Q. That was in December when you volunteered?

A. Yes.

Q. And the Army just told you to wait for further orders? They did not take you then? A. Yes.

Q. And they gave you this paper? A. Yes.

Q. Do you remember then that Christmas came along, is that right? A. Yes.

Q. Do you remember how soon after that Christmas that your uncle died? Have you any recollection of that, Salvador? A. No, I don't.

Q. The next year, that is 1943, when the spring came along do you remember if you were in Tijuana then, in the spring of '43? A. I think we were.

(Testimony of Salvador G. Cervantes)

Q. Now, when you first came to Tijuana that spring after your uncle died, was it at that time that Pete was going around as you have told us, trying to—

Mr. Haughton: Object to this, if the court please, on the ground it is leading and suggestive. [180]

Miss Zacsek: That is right. I will withdraw the question and reframe it.

Q. Salvador, you have told us when you came to Tijuana sometime that Pete went around to these different places and you would go and stand outside. You would go with him and wait outside until he came out again?

A. That is right.

Q. Because he was asking how he could get across the border? A. That is right.

Q. Do you remember when it was that he did that, Salvador?

A. Well, that was around, by the time we came back from the interior.

Q. When you say the "interior" you mean Guadalajara? A. Yes.

Q. That is when you first came back to Tijuana?

A. That is right.

Q. Now, Salvador, you were asked, or, I will withdraw that. Please strike it.

It says here in this indictment, Salvador, that you were charged with, which I have told you before, and you are charged here in Count 2 that when you left here, Los Angeles, on October 30th in 1942, you left it knowingly and unlawfully; that you departed from the United States

(Testimony of Salvador G. Cervantes)

to go [181] to Mexico for the purpose of evading service in the U. S. Armed Services, is that true? A. Yes.

Q. Did you leave here to avoid going into the Army?

A. No, I didn't, but by the time we came back I knew I done wrong because they had told me that.

Q. Yes, I know, you know that now. That is true now, isn't it? A. Yes.

Q. But, look, Salvador, I have to ask you to forget what I have told you and what everybody else told you, the F.B.I. and so forth. I want you to try and go back in your mind to the day that you and your uncle and Pete left the country. Can you go back there mentally?

A. I will try.

Q. Now try and think about the time, Salvador, that you went away that day. Can you remember that?

A. (No answer.)

The Court: You remember the day you went to Tijuana with your uncle and brother and crossed the border into Mexico?

The Witness: I think it was on Hallowe'en Day.

The Court: You remember the occasion?

The Witness: Yes.

Q. By Miss Zacsek: Now, when you went on that day, not [182] now what people have told you, but on that day when you went with Pete, did you do it because you didn't want to go into the Army? Did you do it to get away from going into the Armed Services?

A. No, I didn't. I didn't do it to get away from the Armed Services.

(Testimony of Salvador G. Cervantes)

Q. Well, why did you do it—

A. Well, I just went with my brother. I didn't know I was doing anything wrong.

Q. Since that day, and particularly since I have talked to you, you have been told that that was a crime; that it was wrong and because you went you are guilty of a crime, is that right? A. Yes.

Q. Do you remember, Salvador, that I told you that the crime depended on what was in your mind?

Do you recall that, Salvador? A. Yes.

Q. Do you remember that I told you that it is the intention you had, what you had in your head, the purpose of why you went that made the difference between right and wrong? Do you remember I told you that?

A. Yes.

Q. Now, do you now think that when you went there that you thought you did something wrong then?

A. No, I didn't. [183]

Q. Pete has told you and he told us here that his idea was to come back to the United States right away, as fast as he could and get some action, get into the Army. How did you feel about that? Did you want to do it, too, or did you just want to tag after Pete because he wanted to go? A. I wanted to go in there with my brother.

Q. Wanted to go into the Army with your brother, too? A. Yes.

Q. Is that the reason you came back to the United States? A. Yes.

Miss Zacsek: Thank you, your Honor.

Mr. Haughton, your witness.

(Testimony of Salvador G. Cervantes)

Cross Examination

By Mr. Haughton:

Q. Did you go to school in the United States here, Salvador? A. Yes, sir, I did.

Q. What school did you go to?

A. To the Utica Street Hollenbeck High School.

Q. How long did you go to High School?

A. I went up to the A-11.

Q. Now, when you left with your brother to go to Mexico on Hallowe'en Day, did your brother tell you why he was going? [184] A. No, he didn't.

Q. What? A. He didn't tell me at that time.

Q. Did he tell you that he had been ordered to report for induction?

A. No. He said—He said he only received some papers.

Q. Well, you testified a little bit ago that you knew he had been ordered to report for induction. How did you know that? A. That was afterward.

Q. When you left you did not know that he was supposed to go into the Army? A. No, I didn't.

Q. Yoy know why you registered, don't you?

A. Who.

Q. You? A. I just registered.

Q. You just registered, didn't you?

A. Yes, sir, I did.

Q. You registered because you read in the papers that men in your age group had to register?

A. That is right.

(Testimony of Salvador G. Cervantes)

Q. And you knew when you registered that men in your age group were going to be called into the Army? [185] A. Not at that time.

Q. You knew that they—that is why you registered, didn't you?

A. I registered because I was at the age to register.

Q. And you knew that if you stayed in this country and they knew where you were you would be called up for service, didn't you?

A. Well, not until two or three years later, I think.

Q. Well, you knew that if you stayed here that they would call you up to be examined and to go into the Army?

Miss Zacsek: That is objectionable and calling for an opinion.

The Court: I don't think it is. I have allowed great freedom for counsel to examine the witness on direct examination. The objection is overruled.

Miss Zacsek: I am very deeply appreciative of that.

The Court: I will allow the same latitude to both sides. I want to do what is fair for each.

Miss Zacsek: That is right, your Honor. Thank you.

Q. By Mr. Haughton: You knew that people who registered did so so they could be called into the U. S. Army, didn't you?

A. Well, I knew that was the idea of it.

Q. What?

A. I think that was the idea of it. [186]

Q. Yes. And you had that idea when you registered? You knew that that was what you were registering for, didn't you?

(Testimony of Salvador G. Cervantes)

A. I just went up there and registered but I didn't know the registering meant anything.

Q. You did not know if you registered that that had anything to do with going into the Army?

A. Well, I didn't know at that time.

Q. You knew at that time that is what you registered for, so they could call people into the Army?

A. No, I didn't.

Q. You didn't know that? A. No.

Q. You didn't have any idea what you were registering for? A. No, I didn't.

The Court: What did you think you registered for?

The Witness: (No answer.)

Q. By Mr. Haughton: I show you here Defendants' Exhibit C and ask you if you have ever seen this paper before? A. Yes.

Q. That is your signature at the bottom, "Salvador G. Cervantes? A. Yes. [187]

Q. And did you put your signature there before a Vice Consul of the United States? A. Yes, sir, I did.

Q. Where were you when you did that?

A. In Tijuana.

The Court: What is the date of that?

Mr. Haughton: 20th day of May, 1946.

Q. Where were you when you signed that?

A. In the American Consul.

Q. And did you look at it before you signed it?

A. No, I didn't.

Q. Did he ask you any questions? A. He did.

Q. And did he tell you what he put down on the paper?

A. Yes, he did.

(Testimony of Salvador G. Cervantes)

Q. And did he ask you why you left?

A. Yes, he did.

Q. Left the United States to go to Mexico in November, 1942? A. Yes.

Q. And did you tell him? A. Yes, I did.

Q. It states here that in November 1942, "I wilfully and knowingly departed from the jurisdiction of the United States solely for the purpose of evading and avoiding train- [188] ing or service in the Armed Forces of the United States at which time I was aware that the United States was at war. Did you tell him that?

A. My brother told him that.

Q. Did you tell him that?

A. No, I didn't. I told him that but that was the same story my brother told.

Q. But you told him that, didn't you?

A. I told the same thing.

Q. But he asked you, didn't he? A. Yes, sir.

Q. And you told him? A. Yes.

Q. Did your brother tell you to tell him you left the United States to avoid service?

A. No—well, I only heard what my brother said.

Q. Did your brother tell you to tell him that?

A. I heard my brother so I told the same thing.

Q. Not what you heard your brother say. Did your brother tell you to say just what I read to you?

A. It was the same thing, in the same room.

Q. I know, but when he asked you the questions you answered, didn't you?

A. The same as my brother did.

(Testimony of Salvador G. Cervantes)

Q. Whether it was the same or not he asked the questions [189] of you, didn't he? A. Yes.

Q. And you answered him? A. Yes, sir.

Q. And when you got through making answers to the questions he filled out this paper and he asked you to swear to the truth of what was in it, didn't he?

A. Yes.

Q. And did you so swear? A. Yes.

Q. Did he ask you and did you tell him, "My father, my sole living parent remained in the United States and was opposed to my departure from there." Did you tell him that? A. (No answer.)

Q. Did you tell him that your father didn't want you to go to Mexico when you left in November 1942?

A. Yes.

Q. Then your father did know where you were going when you left? A. No, he didn't.

Q. Then how did you know that he opposed your leaving? A. That was after we went to Tijuana.

Miss Zacsek: I can't hear a word, your Honor. I don't like talking to myself. I want to hear what the witness has to say. Will you instruct him to talk louder? [190]

The Court: Read the answer.

(Question and answer read.)

Q. By Mr. Haughton: Anyway, you told the Vice Consul in Tijuana that your father did not want you to leave and go to Mexico? A. That is right.

Q. And did you tell the Consulate at that time, "My deceased uncle who was at the time a resident of Tijuana, Lower California, Mexico, urged me to leave the United States." Did you tell the Consul that?

(Testimony of Salvador G. Cervantes)

A. That is right.

Q. Is that true? A. Well, that is right.

Q. That is true? A. Yes.

Q. Now, I understood you to say that when your uncle was here and before you left you did not say a word to your uncle and he did not say a word to you?

A. Well, I didn't.

Q. And he didn't say anything to you?

A. No, he didn't.

Q. But he urged you to leave?

A. Not me, my brother.

Q. Well, you said right here that he urged you to leave. [191]

A. Well, I put what my brother put on it.

Q. When you were interviewed by Inspector McFadden of the Immigration and Naturalization Service was your brother with you at the time?

A. No, he wasn't.

Q. You were there alone with him?

A. In the room, yes.

Q. And the girl or woman who was there taking down in shorthand what you said? A. That is right.

Q. And when you were alone there with Inspector McFadden and the stenographer you admitted to him that you left the United States in November 1942 to evade serving in the Army of the United States, didn't you?

A. That is right.

Q. And when you got through with that he asked you to read it after it was transcribed?

A. He didn't tell me that.

Q. He didn't tell you that?

A. He didn't let me see the paper afterwards.

(Testimony of Salvador G. Cervantes)

Q. Well, he at least before you started answering the questions—you took an oath to tell the truth, didn't you? A. That is right.

Q. And you did tell him that you left the United States to go to Mexico to evade service in the Army of the [192] United States, didn't you?

A. That is right.

The Court: That was the truth, wasn't it?

The Witness: Well, I knew the truth when I came over here. That is why I had to tell that.

The Court: Read that answer.

(Answer read.)

Q. By Mr. Haughton: Now, you say that your father came down there to see you in 1943?

A. Yes, he did.

Q. That was in Tijuana? A. Yes.

Q. How often did he come to see you?

A. Well, he didn't use to come very often because he was sick.

Q. Well, how many times? Once or ten times?

A. Once or twice.

Q. But he did come down there to see you?

A. Yes, he did.

Q. And you talked with him? A. Yes, I did.

Q. And he talked with you? A. Yes, he did.

Q. And did he tell you that any papers were addressed to you to his house? [193]

A. He only told me my classification paper.

Q. He didn't tell you you were ordered to report for induction?

A. He didn't receive no papers like that.

(Testimony of Salvador G. Cervantes)

Q. Did he tell you that?

A. He told me that is the only paper he ever received.

Q. What was? A. The classification.

Q. You know what that means, don't you?

A. No, I don't.

Q. I understood you to state on direct examination that 1-A meant you were going to be called to go into the Army?

The Court: He did not so testify, counsel.

Mr. Haughton: I beg your pardon. I understood him to give an explanation of 1-A.

Q. Now, when you left with your brother and your uncle to go to Mexico, if I recall your testimony correctly, you stated that your brother had already received his order to go into the Army?

A. Well, he received some kind of paper. I don't know what it was.

The Court: Didn't he tell you he was ordered to go into the Army?

The Witness: Not until afterwards.

The Court: Didn't he tell you before he left? [194]

The Witness: No, he didn't.

Mr. Haughton: But he did tell you he received some kind of paper? A. That is right.

Q. But he didn't tell you what kind it was?

A. No.

Q. And your uncle didn't tell you? A. No, sir.

Q. And you didn't know what they were?

A. No, I didn't.

Q. How old are you now? A. 23.

Mr. Haughton: That is all.

(Testimony of Salvador G. Cervantes)

The Court: You made a statement before the Federal Bureau of Investigation agents, did you not?

The Witness: That is right.

The Court: Did you tell them the truth?

The Witness: Yes.

The Court: That is all.

Redirect Examination

By Miss Zacsek:

Q. Salvador, does your father speak English?

A. No, he doesn't.

Q. Can he read or write English?

A. No, he can't. [195]

Q. When you were down in the Consulate's office you were there with Pete and you have been saying that whatever you said, whatever you heard Pete say is what you said, is that right? A. That is right.

Q. And then you said that you signed it without reading it? A. That is right.

Q. And you also said that you knew the truth when you came over here. What do you mean by that? And then you went on to say that is why you had to tell that. What do you mean by that, that you knew the truth when you came back to the United States?

A. Well, I knew I had done wrong by that time—by the time I got back over here.

Q. By "that time" you mean people had been talking to you about it? A. Yes, they did.

Q. And after you came back you got the idea of the fact that it was wrong? A. Yes, I did.

Q. And then after you got back here you believed it was wrong? A. Yes, I did.

(Testimony of Salvador G. Cervantes)

Q. Up until that time, until people got to talking to [196] you about it you did not think so, is that right?

A. That is right.

Q. What? A. That is right.

Q. While you were before you talked to me the first time in Tijuana—before you talked to me the first time in Tijuana had you had any feeling of guilt about this departure at all?

Mr. Haughton: I object to that as calling for an opinion and conclusion and leading and suggestive.

The Court: I think the witness has a right to state his state of mind. The jury is the sole judge of the weight to be given to the testimony. He may answer the question.

A. Can you say that question again?

The Court: Read the question.

(Question read.)

Q. By Miss Zacsek: While you were in Mexico with Pete and before you saw me and especially during the time you were talking to Jean, did you think you were all right? I mean, that all you had to do was wait until Jean fixed you up and you would get in the Army and your troubles would be over. A. That is right.

Q. And you didn't think you had done anything wrong? A. That is right. [197]

Q. Did you believe at that time that your whole trouble lay about the fact you did not have any papers?

A. That is right.

Q. That if you had papers you could come back and get in the Army and your troubles would be over?

A. That is right.

(Testimony of Salvador G. Cervantes)

Q. As far as you were concerned, you thought Jean Corteau, because he was on the Selective Service Board, he would fix Pete up and you up and you would go in the Army and that would be all there was to it?

A. That is right.

Q. But after you got to talking to me and to other people and lawyers and the F.B.I. and what-not, then you were told that that was a great sin?

A. That is right.

Q. And for a sin you had to pay for it?

A. That is right.

Q. And until you were told it was a sin you did not know it was a sin, is that right?

A. That is right.

Miss Zacsek: That is all.

Recross Examination

By Mr. Haughton:

Q. Did you ever serve any time in the Army of the Republic of Mexico? [198]

A. I volunteered into the Mexican Army.

Q. Did you ever serve any time there? A. No.

Q. Did you ever ask your Local Board for permission to serve in the Army of Mexico? A. No, I didn't.

Mr. Haughton: That is all.

Miss Zacsek: May I have permission to open up this matter of introducing this, or attempting to introduce this exhibit for identification into evidence? I forgot about it and counsel just brought the matter up and it occurred to me—

The Court: In what respect?

Miss Zacsek: I overlooked attempting to introduce this and show the witness this as a matter of evidence. Mr. Haughton's last question reminded me of my oversight, and I now respectfully ask leave to re-examine him on this matter.

The Court: I have no objection if you have those interpreted, inasmuch as they have been referred to so often. They may be admitted, but it will be necessary to have an interpreter interpret them. Is there an official interpreter here?

Mr. Haughton: No.

The Court: I will admit them both, provided they are interpreted.

The Clerk: Exhibits F and G for identification. [199]

(The documents referred to were marked as Defendants' Exhibits F and G, and were received in evidence.)

Miss Zacsek: And may I have the corollary there too? I move to introduce that into evidence, the little booklet, Exhibit H for identification.

The Court: It is explanatory and will be admitted in evidence.

(The document referred to was marked as Defendants' Exhibit H, and was received in evidence.)

The Court: At this time we had better take our morning recess for ten minutes. The jury is admonished to bear in mind the admonishment heretofore given. We will have a recess for a few moments.

(Short recess.)

The Court: I understand you have arranged for an interpreter to interpret the Spanish into the English language.

Miss Zacsek: Yes.

The Court: Will you stipulate the jurors are present and in the jury box and the defendants are in court with their counsel?

Miss Zacsek: So stipulated.

Mr. Haughton: Yes, your Honor.

The Court: You may proceed.

Miss Zacsek: We are not quite through with the [200] translation.

The Court: We will have it translated in open court before the jury after you have finished with this witness. Are you through with this witness?

Miss Zacsek: Yes.

The Court: Are you through, Mr. Haughton?

Mr. Haughton: Yes.

The Court: Very well, the witness is excused. The interpreter will be sworn.

ARMEDA BAY,

was thereupon sworn to interpret from the Spanish into the English, and the English into the Spanish language.

The Court: Take the witness stand and read the two exhibits that are apparently in the Spanish or Mexican language, into the English language. Give us the number of exhibit first that you are reading from.

The Witness: This is Exhibit G, I believe.

It starts out with "National Army". I guess that is the way you say it, "National Army, Zone 15, Military

(Interpreter Armeda Bay)

Zone 15, Committee of the National Defense, Class No. 1922. Order No.

"Mr. Salvador Cervantes Garcia appeared voluntarily, appeared before the Commission of Registry of the 15th Zone, manifesting his desire to receive military instructions to enable him to join the defense of the nation. [201]

"The interested party has obligated himself to obey the orders with respect to the military authorities and civil authorities in conformity with the disposition of the Government of the Republic of Mexico."

Then it says this document was executed in Guadalajara, Jalisco, on the 23rd day of December 1942, and signed.

The Court: We do not care about the signature.

Miss Zacsek: I would like to have the entire thing in toto, his signature and what is printed under the line for the signature, if your Honor please.

The Interpreter: Right below his signature it says "Signature voluntarily given."

Miss Zacsek: It is the signature of the volunteer.

The Witness: Yes, that is right, signature of the volunteer, and then there is a stamp here of the Government of the State of Jalisco.

Miss Zacsek: And the Commandant?

The Witness: Yes. I haven't gotten to that yet. And there is a stamp of the Commandant of the 15th Zone, of the 15th Military Zone.

Miss Zacsek: Thank you.

The Court: What is on the back of it?

(Interpreter Armeda Bay)

The Witness: It just says—I guess it just says his name and zone and his place of birth at La Barca, Jalisco, and the date of birth, 11th day of December, 1922. Single. [202] Occupation mechanic. He is employed in this establishment and so forth. And there is another signature of the president of the Committee of National Defense.

The Court: And the book of instructions?

Miss Zacsek: May it please the court, at this time I believe we can stipulate that both of these instruments are identical except for the name and the photograph appearing thereon. Will you so stipulate?

Mr. Haughton: So stipulated.

The Court: Can you read that for us?

The Witness: I imagine this is the draft card, identification card, of Salvador Garcia Cervantes. It states his name and place of residence, Tijuana, Baja, California, Tijuana, Lower California. His address and occupation—mechanic; single. It says, "In case of mobilization he is to report to the First Reserve."

The Court: "In case of mobilization"?

The Witness: Yes. And then there is his signature again. Signed at Tijuana on the second day of May, 1945 by the Chief of the Infantry and his name.

The Court: What date?

The Witness: On the 2nd day of May, 1945.

The Court: And what are the instructions?

The Witness: And the instructions here—Article 251: "All Mexican persons between the ages of [203] 18 to 40 shall serve in the military service," and it also states that,

(Interpreter Armeda Bay)

"No person shall leave the country without permission of the military authorities first obtained."

And Article 251:

"These permits should be obtained with the understanding—"

The Court: You will have to speak up?

The Witness: "This permission has to be obtained and they have to express their reason for leaving the country and approximate time they will be out of the country. If this person applying for the permit has not been accepted for the service then in order to leave the country this document is sufficient. Kindly keep this card with you at all times."

That is all it says.

The Court: There is another page, isn't there?

The Witness: Article 216.

"The judges, notaries, or other authorities, employees of the Federation of this Municipality should require the interested person to exhibit this card at all times."

Article 167:

"Doctors that certify the death of any registrant [204] should immediately return or get this card and return it to the proper authorities. This card is not valid with any erasures or alterations and if there should be such this card should be sent to the zone indicated for alteration."

The Court: Is that all?

The Witness: Yes.

The Court: You may be excused.

Have you any further evidence?

Miss Zacsek: At this time we will call Jean Croteau, may it please the court. As far as we are advised, there is no response because Mr. Croteau is ill. We deem him a material witness. He has been duly served with a subpoena and we ask a bench warrant be issued for his appearance.

The Court: Counsel, you have filed a statement as to what you expect to prove by him.

Miss Zacsek: Yes.

The Court: I told you yesterday morning I would issue a bench warrant for the witness but if we were to do so now it would simply mean a continuance of this case. You have filed a statement as to what you expect him to testify to?

Miss Zacsek: Yes.

The Court: And the court will direct that that statement be filed because if he were here the court would not permit him to so testify on the ground it would be [205] incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

Miss Zacsek: Yes, your Honor.

The Court: And furthermore that it is simply corroborative of other testimony that has been introduced in this court. I do not feel it is necessary under those circumstances to order a continuance. The statement shows that he did not contact the defendants until the early part of 1946.

Miss Zacsek: '45, your Honor. If I put in '46 it is an error. I typed it myself in a state of great stupor and exhaustion last night.

The Court: And the statement is on my desk. I will file it with the clerk.

Miss Zacsek: I have my own copy. Just a moment, please. I beg the court's pardon. I ask leave to correct that. Having written it myself I ask it be corrected to show April 1945 and not 1946.

The Court: All right, we will correct it and file it. The ruling still stands. Any further witnesses?

Miss Zacsek: Just one moment, please. The defense rests.

The Court: Does the Government have any additional evidence?

Mr. Haughton: No, your Honor. [206]

* * * * *

The Court: We have the matter of settling instructions.

There is a dispute over some of the instructions and counsel is entitled to be advised prior to the argument as to the instructions the court intends to give which will require some time, so at this time I am going to excuse the jury until 1:30. The jury will bear in mind the admonition the court has heretofore given you and return at 1:30. Will counsel come into my chambers?

(Whereupon, at 11:30 o'clock a.m., the jury was excused until 1:30 o'clock p.m. of the same day.)

(The following proceedings were had in chambers and without the hearing of the jury:)

The Court: The court is advising you at this time it will not give 15, but I will give 16. And 611.21—I do not think there is any objection to it.

611.13 is the one you got up in pursuance to my request?

Mr. Lavine: That was completed at your suggestion.

Miss Zacsek: I sent you a little note.

The Court: But I am going to give that last subdivision.

Mr. Haughton: I have both of them, your Honor, as you requested.

Miss Zacsek: I merely suggest this, your Honor, that as long as one to six inclusive—

The Court: But this other is not. [207]

Miss Zacsek: It only applies to one to six inclusive. It has nothing to do with subdivision 7. That is the reason I am calling your attention to it because—

The Court: You are right, it does not apply to No. 7. It will be eliminated from your proposed instruction 11.

Miss Zacsek: May I please, as long as we have a reporter here, argue with you on the importance of 642.15?

The Court: I do not care to hear an argument. I am going to give you ten minutes to settle these instructions. When 12:00 o'clock comes I will have to leave. I am simply trying to advise you now what instructions I am going to give.

Miss Zacsek: Well, I think nothing is as important as that one section of 642.15 for this reason, may it please the court: It says regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an order to report and so forth—

The Court: That is 642.15?

Miss Zacsek: Yes.

The Court: I said I was going to give it.

Miss Zacsek: Oh, all right. If you give that I don't care much what happens otherwise.

The Court: Well, you know pretty well now what I am going to instruct the jury on, do you not?

Miss Zacsek: Yes. [208]

The Court: And in view of that, will you, as a part of the record, waive that provision of the Rule which requires that you shall be informed in advance what the instructions of the court are going to cover?

Mr. Lavine: We will waive that.

Miss Zacsek: You have told us.

The Court: But just for the record.

Miss Zacsek: We have a record. Certainly we have been here conferring. We have been advised. We know exactly what you are going to do, certainly.

The Court: And as far as the instructions submitted by the Government, there is a conflict in this one instruction that you have submitted, Mr. Haughton. You say here for the purpose of this case you are instructed it is no defense that the defendant was not a citizen of the United States and may have been or is a citizen of another country, the Act in question pertains to every male citizen of the United States and every other male person residing in the United States who was between the ages of 18 and 65. Well, at that time it wasn't 18 and 65.

Mr. Haughton: It was when Salvador registered but not when the other one registered.

The Court: Without reading the rest of it, if I were to give that instruction there would be no occasion to give any of the others. [209]

Mr. Haughton: I think that is correct.

The Court: I am rather inclined to think so, too, but our Circuit Court has been leaning backwards in wanting all these regulations read and so I think I am going to give the regulations and I assume I shall comment on the evidence.

Mr. Haughton: I have no objection to all of them. The only thing is, unless one is familiar with them they are almost not understandable.

The Court: Instruction 15. There is no evidence to support instruction No. 15 in this case.

Miss Zacsek: May I register my earnest protest against the reading of that instruction? The instruction that is not numbered, and which—

Mr. Haughton: The court said he was not going to use that.

Miss Zacsek: If that is going to be read I want to register a protest, the one ending with the phrase, "subject, however, to certain exceptions."

The Court: I am going to give the regulations as I indicated and you will have an opportunity when I am through, if you desire, to take any exception to any of the instructions that I have given. I will excuse the jury while you make them.

Miss Zacsek: Thank you.

Mr. Haughton: I might say in connection with 15 as a [210] ground for the court not using it, if that were to be used a lot of other instructions and regulations would have to also be brought in. That read alone says,

"Anytime in making report he can come in and report to the Board who ordered him up."

The Court: It says "He may".

Miss Zacsek: Well, there are a lot of instructions if read, like Mr. Haughton says, would clutter up the record.

The Court: You know from last night's discussion there is one thing you have to try to tie in and that is that in all good faith somebody should have advised these boys that they could have taken the necessary steps, but by introducing the exhibits this morning they show in effect they did nothing more than register for the Mexican Army. They had a similar setup to ours here. There is nothing to show that they volunteered or registered with their local authorities and they were free to go about their business until they were called up.

Miss Zacsek: That is another reason why I wanted Jean Corteau here, because he is in an authoritative position and can qualify to distinguish between volunteering and registering.

Mr. Haughton: I might state in that connection that I do not think Mr. Corteau is a qualified expert on Mexican law and I think he just got a little soft-hearted and tried to [211] do something so these boys could get into the Army instead of being prosecuted and he had no authorization for it.

Miss Zacsek: I don't think Mr. Corteau is soft-hearted or soft-headed, either, because he told me that 85 per cent of those who are American born and go to Tijuana he will have nothing to do with.

Mr. Haughton: That is the opinion of Colonel Strong, who is the coordinator—

The Court: My contention is, and if I am right his testimony would be immaterial; I have permitted a great deal of testimony to go in to which there was no objection, but nevertheless it was immaterial. In other words,

what they did two years after they went to Mexico was not material. They went down in 1942 and the evidence here shows in 1945 was the first time they made any real move to get back to this country.

Miss Zacsek: But you see with your AWOL's and deserters and delinquents you have a different kettle of fish.

The Court: There is a matter of discretion. If the department of Justice had wanted to let these fellows come back and go into the Army we would never had a case. It is a case, however, which they decided to prosecute and all I have before me is the evidence they have produced and if you can talk the jury into an acquittal you will have done a good job for your clients. [212]

We will reconvene at 1:30.

(Whereupon, a recess was had until 1:30 o'clock p.m. of the same day.) [213]

Los Angeles, California, Thursday, October 31, 1946
1:30 p.m.

The Court: Will you stipulate the jurors are present in the jury box and the defendants in court with their counsel?

Miss Zacsek: So stipulated.

Mr. Haughton: So stipulated.

The Court: Mr. Haughton, you may proceed with your opening argument.

Mr. Haughton: The Government waives its opening argument.

The Court: If you waive your opening argument you can only answer the defendants' argument.

Mr. Haughton: Very well, sir.

(Opening argument by counsel for the plaintiff.)

* * * * *

The Court: You may proceed, counsel.

(Argument of counsel for the defendants.)

* * * * *

The Court: You may proceed with your closing argument, Mr. Haughton.

(Closing argument by counsel for the plaintiff.)

* * * * *

The Court: May the record show it has been stipulated that counsel have been advised prior to their argument as to the instructions that the court intends to give?

Miss Zacsek: So stipulated. [214]

Mr. Haughton: So stipulated.

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, you are here really to try two cases. There are two separate indictments and they are really two separate cases that for convenience have been consolidated for trial but each case must be considered separately and an admission of one of the defendants, such as has been referred to here as a statement before the F.B.I. and other agencies, unless the other defendant was present when that statement was made and acquiesced in it, he would not be bound by it.

So, you must consider each defendant separately and any admissions that they made those admissions cannot be used against the other defendant except as to such

things where they testify as to conversations that they may have had together and in the presence of each other.

When you were sworn as jurors you were advised that you were the sole judges of the facts and that it was incumbent upon you to take the law as given to you by the court. I am now going to try to explain to you the law as it applies to this case in order to help you and as a guidance toward a fair and just verdict.

The indictment involving Pete Garcia Cervantes consists of two counts, both of which have been brought under [215] the Selective Training and Service Act of 1940.

The substance of Count 1 is that it charges the defendant was a registrant of Local Board 199; that pursuant to the Selective Training and Service Act and the regulations promulgated thereunder, the defendant was classified in 1-A and was notified by said Board of said Classification and the notice and order by said Board was duly given to the defendant to report for induction into the Armed Forces of the United States on November 9th, 1942, at Los Angeles, California.

The indictment charges that at said time and place and at all times thereafter until on or about July 14th, 1946, the defendant did knowingly fail and neglect to so report for induction into the Armed Forces of the United States as notified and so ordered to do.

The sole issue for your consideration and decision as to Count 1 is whether the evidence has proved to your satisfaction beyond a reasonable doubt that the defendant, a man required under the Act to register, had been duly commanded by his Local Board to report for induction

and that he, the registrant, has intentionally failed to do so.

Count 2 of the indictment is substantially the same as Count 1, except it alleges that on or about November 9th, in violation of the provisions of the Selective Training and Service Act of 1940, the defendant did knowingly and unlaw- [216] fully evade service in the land or naval forces of the United States in that he did knowingly and unlawfully depart from the United States and did go to a foreign country, to-wit: The Republic of Mexico, and did there remain until on or about July 14, 1946, for the purpose of evading such service.

The indictment insofar as Salvador Garcia Cervantes is concerned consists also of two counts, both of which have been brought under the Selective Training and Service Act, and the substance of Count 1 is the same as the indictment against Pete Cervantes, except that the date of requiring him to report for induction was October 8th, 1943; and Count 2 is identical in that it is alleged that on or about the 30th day of October, 1942, he did knowingly and unlawfully depart from the United States and did go to a foreign country, to-wit: The Republic of Mexico and did there remain until on or about July 14, 1946, for the purpose of evading such service.

In this case under Count 1, the parties have stipulated and you are bound by that stipulation, to all the facts set forth in Count 1, except the question of intent. So, insofar as Count 1 is concerned you only have the one question to determine, because the rest of the questions have been stipulated to. You have just one question to determine and that is was the failure to report intentional and wilfull?

As to Count 2, all the evidence without dispute [217] shows that they, the defendants, did go to Mexico on October 30th, 1942, and the sole issue before you is why did they go to Mexico. Did they go there with the intention to avoid military service in the Armed Forces of the United States? If they went there for that purpose then they are unquestionably guilty. If they didn't go there for that purpose then they are not guilty under Count 2.

I am going to read certain provisions of the regulations passed pursuant to the statute.

Regulation No. 641.3 issued pursuant to the provisions of the Selective Training and Service Act of 1940 provides as follows:

"It shall be the duty of each registrant to keep his Local Board advised at all times of the address where mail will reach him. The mailing of any order, notice or printed form by the Local Board to a registrant at the address last reported by him to the Local Board shall constitute notice to him of the contents of the communication whether he receives it or not."

This regulation, like other regulations that I shall read to you, has the force and effect of law and a violation of this regulation is a violation of the provisions of the Act to which I have referred.

You are instructed that Title 50, Section 305 (a) [218] among other things provides that,

"Diplomatic representatives, technical attaches of foreign embassies, and legations, consuls general, consuls, vice-consuls, and consular agents of foreign countries, and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States and who have not declared their inten-

tion to become citizens of the United States, shall not be required to be registered under Section 2 and shall be relieved from liability for training and service under Section 3(b), Section 303 (b) of this appendix.”

Section 601.2 of the Regulations provides:

“(a) The term ‘alien’ means any person who is not a national of the United States.

“(b) The term ‘national of the United States’ means (1) a citizen of the United States or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

“(c) The term ‘citizen or subject of a neutral country’ is used to designate an alien who is a citizen or subject of a country which is neither a co-belligerent country nor an enemy country. [219]

“(d) The term ‘co-belligerent country’ means any country at war with a country against which the United States has declared war.

“(e) The term ‘alien enemy’ means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States.”

And at all times herein mentioned in the indictment Mexico was a co-belligerent country.

Section 611.13 of the Regulations provides:

“When a nondeclarant alien is not residing in the United States. (a) a male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not ‘a male person residing in the United States,’ within the meaning of Section 2 or Section 3 of the Selective Training and Service Act of 1940, as amended, provided:”

and skipping a number of sections that you heard read in court and going to Paragraph 7:

“He has,” referring to the alien, “within the time prescribed and in the manner provided in Section 611.21, filed with the Local Board with which he is registered, or if he is not registered with the Local Board, having jurisdiction [220] over the area in which he is located, an Alien’s Application for Determination of Residence (Form 302), together with an Alien’s Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the Local Board of an Alien’s Certificate of Nonresidence (Form 303) which has not expired.”

And in this case there has been no evidence that those forms were filed.

Section 611.21 provides as follows:

“What aliens may apply for a determination. Any nondeclarant alien who has entered or who hereafter enters the United States in a manner prescribed by its laws, except a nondeclarant alien described in subparagraphs (1), (2), (3), (4), (5), and (6) of Section 611.13, may file with his Local Board, if he is registered, or with the Local Board where he is at the time located, if he is not registered, an Alien’s Application for Determination of Residence (Form 302); provided, that such application is filed within 90 days after the date of his entry into the United States or within 90 days after persons of his age become liable for training and service by law, whichever is the later; and provided further, that such application is filed [221] prior to induction. And Alien’s Personal History and Statement (Form 304) must be filed with such application.”

And Section 611.21-1 provides:

“Application filed after three months. Any alien who has not complied with the provisions of Section 611.21 or Section 611.26 may file an Alien’s Application for Determination of Residence (Form 302) and an Alien’s Personal History and Statement (Form 304) with a Local Board for transmittal to the Director of Selective Service for consideration.”

As I have stated before, there is no evidence that there has been any compliance with the provisions of that Regulation.

Regulation 633.91 promulgated under the Selective Service and Training Act of 1940, provides as follows:

“Induction and subsequent classification of co-belligerent aliens. (a) At any time prior to his induction into the land or naval forces of the United States, a registrant who is not a citizen of the United States and who has not declared his intention to become a citizen of the United States but who is a citizen or subject of a co-belligerent nation may request and be permitted to be inducted into the Armed Forces of such co-belligerent nation, [222] provided an agreement has been entered into between the United States Government and the Government of such co-belligerent nation, the terms of which permit such induction and give to citizens or subjects of the United States residing in such co-belligerent nation a reciprocal right to serve in the land or naval forces of the United States.

“(b) The manner in which, the time when, and the place where a request may be made by such registrant and the procedure to be followed in order for such registrant to be inducted into the Armed Forces of the co-belligerent

nation of which he is a citizen or subject shall be prescribed by the Director of Selective Service.

“(c) When such registrant files a request for induction into the Armed Forces of the co-belligerent nation of which he is a citizen or subject and fails to report for or to be inducted into the Armed Forces of such co-belligerent nation, he shall, if acceptable, be inducted into the Armed Forces of the United States when his order number is reached.

“(d) When it has been determined that any registrant has been inducted into the Armed Forces of a co-belligerent nation in the manner in this section provided, his classification shall be re- [223] opened and he shall be placed in Class 1-G.”

Regardless of the time when the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (Form 150) or to report for work of national importance pursuant to an Order to Report for Work of National Importance (Form 50), it shall thereafter be his continuous duty from day to day to report for induction or for work of National Importance, as the case may be, to his own Local Board, and to each Local Board whose area he enters or in whose area he remains.

You are instructed that the Regulations promulgated under the Selective Training and Service Act of 1940 provides the following in respect to notice:

“Every person shall be deemed to have notice of the requirements of the Selective Training and Service Act of 1940 and amendments thereto upon publication by the President of a proclamation or proclamations or other public notice fixing a time for any registration. This

provision shall apply not only to registrants but to all other persons.

"If a registrant or a person required to present himself for and submit to registration [224] fails to perform any duty prescribed by the Selective Service law, or directions given pursuant thereto, within the required time, he shall be liable to fine and imprisonment under Section 11 of the Selective Training and Service Act of 1940, as amended.

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.

"It shall be the duty of each registrant to keep his Local Board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the Local Board to a registrant at the address last reported by him to the Local Board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

"The Classification Record (Form 100) shall be open to the public at the Local Board office. It shall be the duty of each registrant to keep himself informed of his status, and any entry concerning him on the Classification Record (Form 100) shall constitute due legal notice thereof to him and to all other interested persons."

These Regulations have the force and effect of law [225] and the violation of these regulations in a violation of the provisions of the Act.

The offenses charged in the indictments require specific intent on the part of each defendant. When this is the case the intent must be shown to exist beyond a reason-

able doubt. The intent may be shown by the acts and declarations of each defendant and by circumstances surrounding their actions.

A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts.

An act or omission committed under an ignorance or mistake of fact under circumstances which disprove any criminal intent is not criminal. Where a person in good faith believes in the existence of certain facts and acts or omits to act with reference to such believed facts in a manner which would be lawful if such facts were as he believes them to be, he is not guilty of a crime, even though his act or omission is such that, if committed by one who knew the true facts, it would constitute a criminal offense.

By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be [226] innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be

such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, [227] because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or

by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which [228] he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your [229] good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might be properly admitted. With such [230] rulings and the reasons for them you are not concerned.

Whether offered evidence is admissible is purely a question of law, and from a ruling on such question you are not to draw any inference as to what weight should be given the evidence, as to the credibility of a witness. In admitting evidence, to which an objection is made, the court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

The verdict to be rendered must represent the considered judgment of each juror.

In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

When you retire to your jury room to deliberate, you will select one of your number as foreman and he will [231] sign your verdict for you when it has been agreed upon. You will then return into court with the verdict and your foreman will represent you as your spokesman in the further conduct of this case in this court.

Forms of verdict have been prepared for your convenience and when you have agreed upon a verdict, the

foreman will sign the verdict upon which you agree and return it into court.

There is one verdict for each of the defendants and a blank space is provided wherein you can insert your findings of guilty or not guilty as to each count as I have heretofore pointed out.

Does counsel desire to take exception to any of the instructions?

Miss Zacsek: May it please the court, the defendants and each of them take exception—

The Court: Just a moment. If you have any exceptions I want to excuse the jury. The jury will be excused for a few moments and you will bear in mind the admonition the court has heretofore given. The defendants have a right and so has the Government to except to any of the instructions that the court has given, and the law provides they shall make those exceptions in the absence of the jury. Under those circumstances you will be excused until called back into the courtroom. [232]

(The following proceedings were had in the absence of the jury:)

The Court: You may proceed.

Miss Zacsek: First, the defendants and each of them take exception to the refusal of the court to read each and every instruction which the defendants have submitted and which the court has rejected, and in particular the instructions numbered 6, 7, 8 and 9. I think that is all the court refused of the defendants, is it not? The court gave three, I believe, did it not?

The Court: I do not have them numbered.

Miss Zacsek: I think the court read No. 3. I think that is all that we submitted.

The Court: Yes, I am quite sure I did. That was on the question of—

Miss Zacsek: Yes, that was given. And the court has already stated that we had our exception to the court's refusal to take the offer of proof?

The Court: Yes.

Miss Zacsek: That is all.

The Court: Will you have the jury return to the courtroom?

(Whereupon the jury returned to open court.)

The Court: The clerk will file the instructions that were refused. The bailiffs will be sworn. [233]

(Whereupon, two bailiffs were sworn in the usual manner.)

The Court: Ladies and gentlemen, you will now retire for your deliberations and I am handing you the blank verdicts and also all the exhibits, documentary exhibits in the case.

I neglected to ask if you stipulated all the jurors were present and in this jury box and that the defendants were in court with their counsel.

Mr. Haughton: So stipulated, your Honor.

Miss Zacsek: Yes, we so stipulate.

The Court: And the court will note they are all present. You may now retire to the jury room for your deliberations.

(Whereupon, at 3:05 o'clock p.m., the jury retired.)

(At 5:10 o'clock p.m., the jury returned to open court and the following proceedings were had:)

The Court: Let the record show the jurors are in the jury box and the defendants are in court with their counsel.

Miss Zacsek: So stipulated.

Mr. Haughton: So stipulated.

The Clerk: The jury has been out now about two hours and it is about dinner time for everybody concerned. I was wondering if there is any question of law that is bothering the jury and that the court might assist you with in arriving at a verdict. [234]

I feel in this case the nature of the evidence is such and the time it has taken to try it, a jury should be able to arrive at a verdict.

It is difficult for the court to understand why, in view of the evidence here, a verdict cannot be reached. I do not desire to put the Government to the additional expense by declaring a mistrial and having to try the case over again. I was wondering if there is any question of law that is bothering the jury. The questions of fact are for you to pass upon.

A Juror: I would like to ask a question of law, your Honor. Is it necessary for a guilty verdict that it must be unanimous?

The Court: It must be unanimous. The jury must agree unanimously on any count. But as I pointed out to you before, when you boil this case down it is a simple question. You have heard the testimony or the evidence offered by the Government under stipulation of counsel.

You have heard the facts as stated by the defendants and you have heard their testimony on the witness stand. From those facts it seems to me that any fair minded jury should be able to agree one way or the other and for that reason the court, at this time, if there are any other instructions required—

A Juror: Shall a report be made before the final verdict on both defendants has been reached? [235]

The Court: Well, of course, under the law you can arrive at a verdict on any one of the counts and so report it.

A Juror: Can we report it at this time?

The Court: Well, you would have to prepare your verdict and submit it in the regular form. The court feels the Government has been to considerable expense in this matter and so have the defendants. The defendants are in jail and if they are to be turned loose they should be turned loose without having to await another trial; and if they are guilty they should be convicted without the necessity of bringing in another jury and impanelling a jury.

I feel that a jury in considering a case should always be free to consult with one another and always be open to reason. By that I do not mean any juror should sacrifice his honest opinion, but I think a jury of 12 people, and you appear to be reasonable people, should be able to arrive at a verdict one way or the other. I am going to give you plenty of time to do it.

If you are ready to go to dinner now I will have the bailiff make arrangements for you.

The bailiff is directed to take the jury to dinner, and I suggest that counsel make arrangements with the bailiffs

as to where they can be contacted. There is no reason why counsel should remain in the courtroom. [236]

Miss Zacsek: Thank you, your Honor.

The Court: Are there any exceptions to the comments of the court?

Miss Zacsek: None, your Honor.

Mr. Haughton: No, your Honor, no exceptions.

(Whereupon, at 5:15 o'clock p.m., the jury retired from the courtroom.)

(At 8:30 o'clock p.m., the jury returned to open court and the following proceedings were had:)

The Court: Will you stipulate the jurors are present and in the jury box and the defendants are in court with their counsel?

Miss Zacsek: So stipulated.

Mr. Haughton: Yes, your Honor.

The Court: Mr. Foreman, the bailiff advises me the jury desires to have some portions of the testimony read to them, is that correct?

The Foreman: That is correct.

The Court: And what portions of the testimony are you interested in?

The Foreman: One of the jurors has a question.

The Court: Very well.

A Juror: May I address the bench?

The Court: Yes.

A Juror: I wanted the testimony of the defendant, the [237] questioning of Salvador after the preliminary questioning where she asked him why he did sign the paper to the effect that he had gone over to Mexico to

avoid the Armed Services and he replied because they told him to, and then she questioned him regarding the fact that he did not have a sense of guilt at the time, but later on he had a sense of guilt when questioned by them and impressed with the fact that he had done wrong. I wanted that clarified in my own mind.

(The portion of the testimony indicated was read by the reporter to the jury.)

The Foreman: May I state we have reached a verdict as to one of the defendants, and should it be turned in now or later? I think we will need only a little while for a little further discussion.

The Court: You had better take some more ballots and if you decide you cannot agree you may return into court and I will not keep you all night.

The Foreman: All right.

A Juror: May I address the court, please, in connection with this testimony? It is my recollection that during or shortly after the conclusion of the cross examination the court addressed some questions to the witness. Could we hear those questions and answers, please?

The Court: I want to give one additional instruction to [238] the jury. It may be repetitious; but Salvador is charged under two counts. One of them charges evading service by going to Mexico, which is an independent offense from failing to report. Under the law it was the duty of Salvador to report and the failure to keep in touch with his Draft Board is no excuse. The only question insofar as Salvador is concerned on the first count is whether he did it intentionally. But the law requires that when a man registers and he has been classified by his

Board that he must have a mailing address where notices will reach him, and that it is the duty and it is imposed upon him to keep his Board advised of any change of address so that when the Board mailed the notice to report to Salvador at the last known address, and when he failed to report, and if it was done intentionally, then he is guilty under Count 1. In other words, what I am trying to point out to you is that a person may or may not be guilty of Count 1 or may or may not be guilty of Count 2. They are not all one offense.

Miss Zacsek: May I respectfully request an exception to the court's remarks?

The Court: In what respect is it in error?

Miss Zacsek: I deem it in error because it exceeds the questioning of the jury. Nobody on the jury has requested the court to comment on the law. The court asked the jury earlier this evening if the jurors or any of them would like [239] assistance on it from the court on the point of law and there was a unanimous silence.

The Court: Just a moment. I have heard your objection. I wish to state that even if I wanted to comment on the evidence at this late date I could do so and give this jury any instruction as to the law or as to the facts, if I wanted to discuss the facts with the jury, which I have not done, and if I have expressed any opinion that indicates the court's viewpoint in the matter it is not binding upon the jury in any way, shape or form.

Miss Zacsek: I would like to state the further grounds of my objection, your Honor. You asked me if I had any exceptions but you did not permit me to finish and I would like that privilege. We have a record—

The Court: Proceed.

Miss Zacsek: The second ground is—I wish to conclude the first one. The court had volunteered when nobody asked the court to express an opinion or a direction on the point of law. Secondly, the court reiterated a matter which I think has been exceedingly clearly stated to the jury, to-wit, that there were not only as to Salvador but as to Pete Cervantes, two distinct counts for each defendant. Therefore, the reiteration and the drawing of the attention of the jury I feel is beyond the bounds of the court's province at this particular point and for that reason I wish the record to [240] show the exception taken by the defendants.

The Court: Exception noted. The comments I have made have only pertained to one defendant.

A Juror: If your Honor please, what does the classification 4-C stand for?

The Court: That is one that is not subject to military service. Mr. Haughton, do you have that?

Mr. Haughton: I will get it and read it if the court please. 4-C is the classification accorded an alien who departs from the United States to evade service, among several other classifications. If the court wishes I will get the classification and let it be read.

Miss Zacsek: I think that is a very good suggestion so we have it in toto because I also understand when Form 303 is given that that classification is applicable—after that certificate is issued. I may be in error.

The Court: I am not going to hold this jury while counsel is looking up some books. I can state simply that 1-A classification is the classification under which people were inducted into the Army.

A Juror: Your Honor, I would like to state at this time that I was going to ask you to clarify that law, the law that you just gave us. Also I would like to know if a man is not receiving his order for induction due to his neglect in giving the right mailing address, is that, according [241] to law, an intent to avoid service?

The Court: Well, that is a matter for you to consider. You will get a tax bill in a few days—that is, you are supposed to, but if you don't get it and do not pay the tax you will pay the penalty. But this is a criminal offense and if there is a reasonable doubt in your mind as to the intent of these defendants or either of them they are entitled to the benefit of that doubt.

The jury will retire for further deliberation.

(Whereupon, at 9:20 o'clock p.m. the jury retired.)

(At 9:50 o'clock p.m., the following proceedings were had in open court in the presence of the jury:)

The Court: Will you stipulate the jurors are present in the jury box and the defendants are in court with their counsel?

Miss Zacsek: So stipulated.

Mr. Haughton: Yes, your Honor.

The Court: Members of the jury, have you arrived at a verdict?

The Foreman: Yes, your Honor.

The Court: Present the verdict to the clerk, please. The clerk will read the verdict.

(Verdict read.)

The Court: Members of the jury, is that your verdict as read? [242]

(Assent.)

The Court: Do you desire to have the jury polled?

Miss Zacsek: Yes.

The Court: The clerk will poll the jury.

The Clerk: Are the two verdicts as I read them your verdict?

(The entire jury being polled answered in the affirmative.)

* * * * *

Miss Zacsek: * * * * * Under the rules is it essentially necessary at this time to give oral notice of appeal or whether one can—

The Court: It is ten days. You are given ten days in which to file notice of appeal.

Miss Zacsek: Then an oral statement is not required at this time?

The Court: That is my understanding and the record will show that I have so stated to you.

(Whereupon, at 10:10 o'clock p.m., the above entitled matter was concluded.)

[Endorsed]: Filed Jan. 7, 1947. [243]

[Endorsed]: No. 11471. United States Circuit Court of Appeals for the Ninth Circuit. Pete Garcia Cervantes, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed January 14, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11471

PETE GARCIA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Comes now the appellant in this action in connection with his appeal, and makes the following statement of points on appeal on which he intends to rely:

1. That the Court erred in refusing to give an instruction that every alien between the ages of 21 and 36, who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose is taken or established, is required to present himself for and submit to registration unless such alien falls within one of the specific clauses exempted from such registration by Section 5(a) of the Selective Service and Training Act of 1940, as amended.

2. That the Court erred in refusing to give an instruction that the Rules and Regulations made by the Director of Selective Service and Training Act of 1940 does not provide any norm or standard by which the Local Board can determine whether or not a person is in one of the "other categories" mentioned in Section 5 of the Act, 50 U. S. C. A., Appendix, Section 305, nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a per-

son is or is not residing in the United States, as that term is used in Sections 2 and 3 of the Act, 50 U. S. C. A., Appendix, Sections 302, 303.

3. That the Court erred in refusing to give an instruction that due process has been denied where there is no rule promulgated in the regulations whereby any standards are established for any person who is subject to the Selective Training and Service Act to determine whether or not he is or is not, entitled to a certificate of non-residence.

4. That the Court erred in refusing to give an instruction that by treaty dated January 22nd, 1943, between the United States of America and the Government of Mexico, the nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence; that nationals of each country who have been registered for or inducted into the army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals, and with their consent be released for military service in its forces; that the procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objection desired.

5. That the Court erred in refusing to give an instruction that if a delinquent reports or is brought before a Local Board, other than his own Local Board, the Local Board to which he reports, or before which he is brought, shall advise his own Local Board, by telegram or other

expeditious means that the delinquent has reported to or has been brought before such Local Board and that he will be inducted or assigned to work of national importance as the case may be if it is satisfactory to his own Local Board; that the registrant's own Local Board shall reply by telegram or other expeditious means.

That the Court erred in refusing to give as part of the above instruction that if the registrant's own Local Board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to Work of National Importance or the Local Board to which he has reported, or before which he has been brought, shall prepare such papers as may be necessary in order to effect such induction or assignment and forward copies thereof to the registrant's own Local Board; that the Induction or Assignment of such a registrant shall be reported to the registrant's own Local Board in the same manner as if the registrant had been transferred for delivery to the Local Board from which such registrant was inducted.

That the Court further erred in refusing to give as part of the above instruction that if the registrant's own Local Board advises that an Order to Report for Induction (Form 150), or an Order to Report for Work for National Importance (Form 50) has not been issued to

such registrant or that the registrant is no longer a delinquent, it shall advise the Local Board before which the registrant has appeared or has been brought of the action to be taken with reference to such registrant.

6. That the Court erred in refusing to allow a written offer of proof to be admitted in evidence, of the testimony of Eugene Cordeau, Sr., a material witness, and to be submitted to the jury.

7. That the defendant has been denied due process of law.

8. That the verdict of the jury was contrary to law.

9. That the verdict of the jury was contrary to the evidence.

Wherefore, the appellant prays that the judgment of the District Court may be reversed.

ANNA ZACSEK and
HOWARD A. LEVINE

By Anna Zacsek

Attorneys for Appellant

Received copy of the within Statement of Points on Appeal this 31 day of January, 1947. James M. Carter, U. S. Atty., by Wm. P. Haughton, Asst. U. S. Atty., Attorneys for Government.

[Endorsed]: Filed Feb. 3, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

ORDER THAT ORIGINAL EXHIBITS BE
CONSIDERED IN THEIR ORIGINAL FORM

Good cause therefore appearing, It Is Ordered that all of the original exhibits in above cause need not be printed in the transcript of record herein, but will be considered by this Court in their original form.

FRANCIS A. GARRECHT

Senior United States Circuit Judge

Dated: San Francisco, Calif., February 4, 1947.

[Endorsed]: Filed Feb. 4, 1947. Paul P. O'Brien,
Clerk.

No. 11471

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PETE GARCIA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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MAY 9 - 1947

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No. 11471

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETE GARCIA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

This is an appeal from the District Court of the United States, Southern District of California, Central Division, of a conviction of the appellant in two counts of an information charging the defendant with violation of the Selective Training and Service Act of 1940, and certain regulations allegedly issued pursuant thereto.

Jurisdiction.

Jurisdiction is conferred by Title 50, App. Sec. 311. The appellant was charged against by the Grand Jury on the 21st day of August, 1946, charging him with two counts of violation of the Selective Training and Service Act of 1940, as amended (U. S. C., Tit. 50, App., Sec. 311).

Judgment was pronounced against the defendant on Counts I and II, on the 31st day of October, 1946, by the Honorable Judge Ben Harrison. Notice of appeal was duly and regularly filed on the 8th day of November, 1946.

The Conviction was under the following counts:

Count I, which charged that the appellant, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 199, said board then and there being duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 9, 1942, at Los Angeles, County, California, in the division and district aforesaid; on or about November 9, 1942, and at all times thereafter until on or about July 14, 1946, the defendant did knowingly fail and neglect to perform a duty required of him under said act and regulations promulgated thereunder, in that he did knowingly fail and neglect to report for induction into the armed forces of the United States as so notified and ordered to do.

Count II, is a copy in every detail of Count I, except that the concluding language, charged that the appellant, on or about November 9, 1942, in violation of the provisions of said Selective Training and Service Act of

1940, did knowingly and unlawfully evade service in the land or naval forces of the United States of America, in that he did knowingly and unlawfully depart from the United States of America, and go to a foreign country, to-wit, the Republic of Mexico, for the purpose of evading service in the land or naval forces of the United States, and did there remain until on or about July 14, 1946.

Short Statement of Facts.

The appellant, Pete Garcia Cervantes, was charged by the grand jury with the offense of violation of the Selective Service and Training Act of 1940, in that he did knowingly fail and neglect to report for induction into the armed forces of the United States, as more fully set forth in Count 1 of the Indictment, and that he did knowingly and unlawfully depart from the United States and go to a foreign country,—the Republic of Mexico, for the purpose of evading service in the land or naval forces of the United States, and did there remain until on or about July 14, 1946, as more fully set forth in Count 2 of said Indictment.

Pete Garcia Cervantes, the appellant, was born August 12, 1919, at La Barca, Mexico, and brought to the United States by his parents in 1923. [R. 87.] He never returned to Mexico until October 30, 1942. He lived in the United States from 1923 until October 30, 1942, in Los Angeles, California, and attended Utah Street Grade School, Hollenbeck Junior High School and Frank Wiggins Trade School until he was 18 years old, when he commenced working. He worked for several years for Swift and Company, and other concerns. He is married

to an American citizen, and has three children, born in Los Angeles, California.

He registered under the Selective Training and Service Act in Los Angeles, on October 16, 1940, at Local Draft Board No. 199, in Los Angeles. In the Questionnaire submitted to him [Government's Ex. 5] he swore that he was born in La Barca, Mexico, on August 12, 1919, that he was a citizen of the Republic of Mexico, *that he had not declared his intention to become a citizen of the United States*, that his alien registration number was 3222154, and that he had not filed a petition for naturalization. Appellant testified that he signed and swore to the questionnaire before one Nathan Klein, at Local Draft Board No. 199 [R. 99], but that nobody informed him of the law, or the facts, pertaining to his alien citizenship, in relation to the Draft Law, nor did he have any knowledge of his status at such time, or thereafter. [R. 99, 100.]

Thereafter, Cervantes received an order to report for induction on November 9, 1942. [Government's Ex. 6.] On October 30, 1942, Cervantes was persuaded by his uncle to depart for Mexico, and he and his brother crossed the border at San Ysidro, California, on said date, arriving at Tia Juana, Mexico. Three weeks later, he went to Guadalajara, Mexico, and volunteered for service in the Mexican Army. [R. 110, and Deft. Ex. F.] He remained in Guadalajara for a period of eight months waiting to be called into the Mexican Army [R. 109], and then returned to Tia Juana, where he remained until July 14, 1946. He testified that he made repeated efforts to return to the United States during his stay in Tia Juana, and that he went to various officials, both

Mexican and American, expressing his desire to return to the United States and enter the armed forces of the United States. [R. 52, 60, 61, 114, 123, 127, 148, 149.] He signed an application for a visa, non-quota, from the American Foreign Service at Tia Juana [Deft. Ex. B], but his application was rejected. About April, 1945, Eugene Cordeau, Sr., a member of the Selective Service Board No. 165, at National City, California, hearing about his problem, offered to aid him in returning to the United States, and enter the American Army, and in pursuance of said efforts, wrote letters to Colonel H. K. Leach, State Director of Selective Service in California, who, in turn, forwarded said letters to Local Board No. 199. [Government's Ex. 11, 13.] Cervantes also wrote a letter to Local Board No. 199, enclosing a letter from Eugene Cordeau, Sr. [Government's Ex. 12.] Failing to find assistance in his efforts, he came into the United States on July 14, 1946, and surrendered forthwith to the agents of the F.B.I. [R. 128.]

Questions Raised by This Appeal.

1. Did the trial court err in failing to instruct the jury on the statutes and regulations of the offenses for which the defendant was being tried?
2. Whether the Court committed reversible error in its various rulings during the case.
3. Whether the Court committed reversible error in giving certain instructions, and refusing to give others to the jury.
4. Is the evidence sufficient to support the conviction of appellant?
5. Was the defendant denied due process of law?

Specification of Error No. 1.

The trial court erred in failing to instruct the jury on all of the statutes and regulations applicable to the offenses for which the defendant was being tried.

Specification of Error No. 2.

The Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time, and in the manner, prescribed by law, duly excepted.

“Defendant’s Proposed Instruction No. 5. [R. 10.]

You are instructed that every alien between the ages of 21 and 26 who lives or has a place of residence or abode in the United States, temporary, or otherwise, or for whatever purposes taken or established, is required to present himself for and submit to registration *unless such alien falls within one of the specific classes exempted* from such registration—”

Specification of Error No. 3.

The Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant’s Proposed Instruction No. 6. [R. 11.]

You are instructed that the rules and regulations made by the director of the Selective Training and Service Act of 1940 do not provide any norm or standard by which the local board can determine whether or not a person

is in one of the "other Categories" mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Sect. 305, nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not residing in the United States, as that term is used in Section 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

Specification of Error No. 4.

The Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 7. [R. 11.]

You are instructed that a male alien who is now in or hereafter enters the United States, who has not declared his intention to become a citizen of the United States, is not a "Male person residing in the United States," within the meaning of Section 2 or Section 3 of the Selective Training and Service Act of 1940 as amended.

Specification of Error No. 5.

That the Court in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 8. [R. 12.]

You are further instructed that due process has been denied where there is no rule promulgated in the regulations whereby any standards are established for any

person who is subject to the Selective Training and Service Act to determine whether or not he is or is not entitled to a certificate of non-residence.

Specification of Error No. 6.

That the Court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 9. [R. 12.]

You are instructed that by treaty dated January 22, 1943, between the United States of America and the Government of Mexico, the nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence.

Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter, and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objections desired.

Specification of Error No. 7.

That the Court erred in refusing to give the following instructions proposed and offered by defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 15. [R. 14.]

(a) If a delinquent reports or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted or assigned to work of national importance, as the case may be, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to report for Induction (Form 150) or an Order to Report for Work of National Importance, (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to work of national importance, and the local board to which the registrant has reported, or before which he has been brought shall prepare such papers as may be necessary in order to effect such induction or assignment and forward copies thereof to the registrant's own local board. The induction or assignment of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for delivery to the local board from which such registrant was inducted or assigned.

(c) If the registrant's own local board advised that an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance

(Form 50) has not been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared or has been brought of the action to be taken with reference to such registrant.

Specification of Error No. 8.

That the Court erred in refusing to allow a written offer of proof to be admitted in evidence, of the testimony of Eugene Cordeau, Sr., a material witness and to be submitted to the jury.

The ruling was made as follows [R. 175]:

“Miss Zacsek: At this time we will call Jean Cordeau, may it please the court. As far as we are advised, there is no response because Mr. Cordeau is ill. We deem him a material witness. He has been duly served with a subpoena and we ask a bench warrant be issued for his appearance.

The Court: Counsel, you have filed a statement as to what you expect to prove by him.

Miss Zacsek: Yes.

The Court: I told you yesterday morning I would issue a bench warrant for the witness, but if we were to do so now it would simply mean a continuance of this case. You have filed a statement as to what you expect him to testify to?

Miss Zacsek: Yes.

The Court: And the Court will direct that that statement be filed because if he were here the Court would not permit him to so testify on the ground it would be incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

ARGUMENT.

I.

The Court Erred in Refusing to Instruct the Jury on All of the Statutes and Regulations Applicable to the Offenses For Which the Defendant Was Being Tried.

SPECIFICATIONS OF ERROR.

Specifications of Error 1, 2, 3, 4, and 5 will be considered together.

The Court erred in refusing to give the following instructions proposed and offered by the defendant, to which refusal the defendant, within the time and in the manner prescribed by law, duly excepted.

Defendant's Proposed Instruction No. 5.

You are instructed that every alien between the ages of 21 and 36 who lives or has a place of residence or abode in the United States, temporary, or otherwise, or for whatever purposes taken or established, is required to present himself for and submit to registration *unless such alien falls within one of the specific classes exempted* from such registration by Section 5(a) of the Selective Training and Service Act of 1940.

Defendant's Proposed Instruction No. 6.

You are instructed that the rules and regulations made by the director of the Selective Training and Service Act of 1940 do not provide any norm or standard by which the local board can determine whether or not a person is in one of the "other Categories" mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Section 305, nor do they provide a norm or standard by which if

certain facts are present it can determine whether or not a person is or is not residing in the United States, as that term is used in Sections 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

Defendant's Proposed Instruction No. 7.

You are instructed that a male alien who is now in or hereafter enters the United States, who has not declared his intention to become a citizen of the United States, is not a "male person residing in the United States," within the mean of Section 2 or Section 3 of the Selective Training and Service Act of 1940 as amended.

Defendant's Proposed Instruction No. 8.

You are further instructed that due process has been denied where there is no rule promulgated in the regulations whereby any standards are established for any person who is subject to the Selective Training and Service Act to determine whether or not he is or is not entitled to a certificate of nonresidence.

In 39 Op. A. G. 505, October 11, 1940, the Attorney General of the United States rendered the following opinion in connection with an interpretative ruling upon the meaning of the words "male alien residing in the United States" under Section 2 of the Selective Training and Service Act of 1940:

"Reading the above-quoted provisions of the Act together, it is my opinion that Section 2 requires every alien between the ages of 21 and 36 who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established, to present himself for

and submit to registration, *unless such alien falls within one of the specific classes exempted from such registration by Section 5(a)*. Whether any particular alien who fails so to register will thereby render himself amenable to the penal provisions of the statute will depend upon the facts in his individual case.”

Section 305(a) of the Selective Training and Service Act, Title 50 App., provides that:

“* * * diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice consuls *and persons in other categories*, to be specified by the President, residing in the United States, *who are not citizens of the United States, and who have not declared their intention to become citizens of the United States*, shall not be required to be registered under Section 2 (Section 302 of this Appendix) *and shall be relieved from liability for training and service under Section 3(b) (Section 303(b) of this Appendix).*”

In *Ex parte Asit Ranjan Ghosh*, 58 Fed. Supp. 851, the Court is quoted as follows:

“I believe that the power existed under Section 5 of the Act for the President to establish “categories of people” who would be non-residents. But the President delegated his power to the Director of Selective Service in that connection. The Director of Selective Service did not, either in his own name, or in the name of the President, specify

or establish any categories other than those that, in the Act, are designated with particularity.

I think he has simply, under the regulations as they now stand, reserved to himself the power personally to determine—by what rules no one would know—the petitioner, or any other person who sought a certificate of exemption,—whether he was or was not entitled to it.

That, in my judgment, is what is described in the decisions as arbitrary and capricious, and I would say lack of due process, and a lack of rule of reason.

I do not think the rules and regulations provide any norm or standard by which the local board can determine whether or not a person is in one of the 'other categories' mentioned in Section 5 of the Act, 50 U. S. C. A. Appendix, Sect. 305, nor do they provide a norm or standard by which, if the facts are present, it can determine whether or not a person is or is not 'residing in the United States' as that term is used in Sections 2 and 3 of the Act, 50 U. S. C. A. Appendix, Sections 302, 303.

It seems to me due process has also been denied the petitioner, because there is no rule promulgated in the regulation whereby any standards are established for any person who is subject to the Act to determine whether or not he is or is not entitled to a certificate of non-residence."

Appellant was a Mexican National, who was not a citizen of the United States and had not declared his in-

tention to become a citizen of the United States. He held an alien registration card and had not filed a petition for naturalization. All of these facts were submitted under oath to his local draft board. [R. 99, 100.]

It is the contention of appellant that he was denied due process of law in the following particulars, to-wit:

1. That he was not notified or advised by his local draft board as to his alien status under the existing statutes and regulations of the Selective Training and Service Act, and that he had a right to claim exemption from the draft.

2. That his local draft board had erroneously classified him as 1-A.

3. That the appellant was a male alien who was not required to submit to registration, in that he came within one of the specific classes exempted from such registration by Section 5(a).

4. That it was the duty of his local draft board to grant him a certificate of exemption, or a certificate of non-residence.

Having, nevertheless, registered, appellant was denied knowledge of the existence of "Alien's Application for Determination of residence (Form 302)," together with an "Alien's Personal History and Statement (Form 304)": that he had no knowledge of the existence of said applications, or of the forms, and no one advised him of the existence of same, nor were such forms available

to him, nor did the members of his board, or either of them, at any time, or at all, give to him the benefit of what undoubtedly was their superior knowledge, either directly or indirectly. [R. 99, 100.]

In *United States v. Cain*, 149 F. (2d) 338, is found the following opinion:

“Induction in the Army must indeed be by summary procedure, but we have a number of times decided that when it appears that a local board has denied to registrants the protection which the Statute and the regulations afford them, we must intervene. (Citing) *United States v. Kanten*, 2 Cir. 133 F. (2d) 703; *United States ex. rel. Phillips v. Downer*, 2 Cir. 135 F. (2d) 521; *United States ex. rel. Reel v. Badt*, 2 Cir., 141 F. (2d) 845; *United States ex. rel. Beye v. Downer*, 2 Cir. 143 F. (2d) 125. The same assumption underlies our decisions in *United States ex. rel. Brandon v. Downer*, 2 Cir. 139 F. (2d) 761; *United States ex. rel. La-Chanty v. Commanding Officer*, 2 Cir. 142 F. (2d) 381; and *United States ex. rel. Trainin v. Cain* (2 Cir., 144 F. (2d) 944).”

The provisions in Selective Service Act that decisions of Selective Service Board shall be final, narrowly limits the scope of judicial examination of board's actions, but Congress did not intend by the use of such words to deny any registrant constitutional protection of due process of law.

United States v. Cain, 144 F. (2d) 944.

II.

The Court Erred in Refusing to Instruct the Jury on the Matter of the Treaty Between the United States of America and the Government of Mexico, as Embodied in Defendant's Proposed Instruction No. 9.

Specification of Error No. 6.

On January 22, 1943, the Government of Mexico, and the United States of America, entered into a treaty relating to military service of the nationals of either country residing in the other country. 57 U. S. Statutes at Large, 975, 78th Congress, 1st Session, 1943.

"IX. Nationals of each country who have been registered for, or inducted into, the Army of the other country in accordance with the military service laws of the latter, and who have not declared their intention to acquire the citizenship of the country in which they reside, shall upon being designated by the country of which they are nationals, and with their consent, be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of those persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired."

Appellant's testimony was as follows [R. 110]:

Q. By Miss Zacsek: Now, when you went to Guadalajara, did you do anything about the Mexican Army? A. We volunteered in the Mexican Army.

Q. If you do not speak up I cannot hear you across the room and I am certain I couldn't hear any

of the conversation you had with the court. A. Well, I volunteered in the Mexican Army.

Q. Now, I am going to show you that piece of paper which has been here introduced as an exhibit, it being Defendant's Exhibit F for identification, and ask you what that piece of paper is? A. (No answer.)

Q. Did you receive it? A. I did.

Q. And when did you receive it? A. The day I volunteer.

Q. From whom did you receive it? A. From—well, the military officer.

Q. From a military officer? A. Yes.

Miss Zacsek: I now move to introduce that into evidence, your Honor.

Mr. Haughton: Objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: The objection will be sustained. I am still taking the position I took this morning, that he cannot go across the line to Mexico and offer to volunteer into the Mexican Army and avoid the responsibility to this Government.

Miss Zacsek: And I am still taking the position of the treaty between the governments as being paramount to any opinion of counsel or court, unless we have the most authoritative voice on that subject, your Honor, and I say that with the utmost respect."

Regulation 633.91, promulgated under the Selective Service and Training Act of 1940, provides as follows:

"Induction and Subsequent Classification of Cobelligerent aliens:

(a) At any time prior to his induction into the land or naval forces of the United States, a registrant

who is not a citizen of the United States and who has not declared his intention to become a citizen of the United States, but who is a citizen or subject of a co-belligerent nation, may request and be permitted to be inducted into the Armed Forces of such co-belligerent nation, *provided an agreement has been entered into between the United States Government and the Government of such belligerent nation, the terms of which permit such induction and give to citizens or subjects of the United States residing in such co-belligerent nation a reciprocal right to serve in the land or naval forces of the United States.*

(b) The manner in which, the time when, and the place where, a request may be made by such registrant and the procedure to be followed in order for such registrant to be inducted into the Armed Forces of the co-belligerent nation of which he is a citizen or subject shall be prescribed by the Director of Selective Service."

It is submitted that the Director of Selective Service did not prescribe any rule or regulation setting up the machinery for the administration of Section (b) of Regulation 633.91, above set forth.

Appellant, a Mexican national, departed on October 30th, 1942, for Mexico, a co-belligerent nation. Thereafter, he volunteered for service in the Mexican Army by enlisting at Guadalajara.

It was the obvious intention of the respective governments of the United States and Mexico, by entering into the treaty of January 22, 1943, that their respective nationals be permitted to enter the army of their own country, even though residing in the other country. It is evident that under the existing statutes and regulations

of the Selective Training and Service Act, it would be difficult, if not almost impossible, for Mexican nationals residing in the United States, to return to Mexico to serve in the Mexican Army. Thus, the treaty mentioned herein was promulgated to serve the purposes for which it was intended. As appears in the text of the treaty, the official comment by His Excellency, Ezequiel Padilla, Minister of Foreign Relations, Mexico, D.F., shows that the two nations had determined to reach a satisfactory agreement which would co-incide with the excellent relations which happily bind the two Republics.

According to the United States Chargé d’Affairs, as interim, Hon. Herbert S. Barclay, “it is the belief of the United States Government that this agreement adds further testimony to the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving the victory.”

Since a treaty and an act of Congress are of equal dignity, it follows that an act of Congress may be repealed or superseded by a later treaty.

U. S. v. La Yen Tai, 22 S. Ct. 629; 185 U. S. 213.

Therefore, where the provision of an act of Congress and a subsequent treaty are conflicting, the latter will control.

Rubas v. U. S., 24 S. Ct. 727; 194 U. S. 315.

Treaties should ordinarily be construed liberally to give effect to the apparent or expressed intentions of the parties in order that justice may be done to citizens or subjects of the parties.

63 Corpus Juris 839.

A treaty, as a solemn international obligation or contract, should be faithfully observed by each of the con-

tracting parties; in other words, a treaty is to be executed in the utmost good faith, with a view to make effective the purposes of the high contracting parties.

63 Corpus Juris, 848.

Expulsion without trial of American citizen from Mexico is a violation of a treaty provision between these countries granting their special protection to the persons and property of the citizens of each other.

Otocha v. U. S., 8 Ct. Cl. 427.

Quoting from the treaty of January 22, 1943:

“The procedure for the transportation and turning over of these persons will be agreed upon by appropriate authorities of the two countries who are empowered to bring about the objectives desired.”

It is submitted further by appellant that careful search had revealed no such procedure was ever agreed upon or prescribed by the appropriate authorities of the two countries.

Thus, appellant, being a citizen of Mexico, and having declared that he did not intend to become a citizen of the United States, was not afforded the full measure of due process in that

1. The Director of Selective Service did not prescribe any rule or regulation for the administration of Section (b) of Regulation 633.91, Selective Training and Service Act of 1940.

2. Neither the Government of the United States, nor the Government of Mexico prescribed the procedure for the transportation and turning over of Mexican nationals in accordance with the provisions of the treaty of January 22, 1943, 57 U. S. Statutes at Large, 975, 78th Congress, 1st Session, 1943.

III.

The Court Erred in Refusing to Give the Following Instruction Proposed and Offered by Defendant, to Which Refusal the Defendant, Within the Time and in the Manner Prescribed by Law, Duly Excepted.

Defendant's Proposed Instruction No. 15. [R. 14, 15.]

If a delinquent reports or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted or assigned to work of national importance, as the case may be, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to work of national importance, and the local board to which the registrant has reported or before which he has been brought shall prepare such papers as may be necessary in order to effect such induction or assignment and forward copies thereof the registrant's own local board. The induction or assignment of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for

delivery to the local board from which such registrant was inducted or assigned.

(c) If the registrant's own local board advises that an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) has not been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared, or has been brought of the action to be taken with reference to such registrant.

Appellant's testimony shows that he contacted Eugene Cordeau, Sr., a member of Local Board No. 168 of National City, California in April, 1945. [R. 52, 53, 58, 59, 86, 122] for the purpose of returning to the United States and being inducted into the United States Army. That prior, and after such time, he made numerous efforts to return to the United States. [Government's Ex. 11, 12, 13; Deft. Ex. A, B.; R. 33, 51, 52, 53, 112, 113, 114, 116.]

It is appellant's contention that the regulation 642.41 of the Selective Service Act Regulations, provided a means for a delinquent who has failed to respond to an Order to Report for Induction, or an Order to Report for Work of National Importance, *to be delivered for induction* or steps taken to assign him to work of national importance.

When appellant reported to Eugene Cordeau, Sr., a member of the Selective Service Board No. 168, in April, 1945, the war with Germany was practically over, but the United States was still faced with the war in the Pacific. It was estimated by reputable military authorities that the possible American casualties would approximate

1,000,000 men in an invasion of Japan. In the face of this, the appellant clearly evidenced an intent to return to the United States and be admitted into the United States Army.

Under the existing regulations it was incumbent upon appellant's local board to take steps to effect the induction or assignment as the case may be. The Selective Training and Service Act was in full force and effect until March 31, 1947.

IV.

The Court Erred in Refusing to Allow a Written Offer of Proof To Be Admitted in Evidence, of the Testimony of Eugene Cordeau, Sr., a Material Witness, and To Be Submitted to the Jury.

At the opening of the proceedings of this case, on October 30, 1946, at 10:00 A.M. counsel for defendant made an oral statement to the Court [R. 19, 20], that Mr. Eugene Cordeau, Sr. (referred to as Mr. Jean Cordeau), was a material witness upon whom the defense was predicated as the most essential witness; that said witness had been served personally; that a return of the subpoena had been duly filed; that the said witness had been present in court on all previous proceedings on this matter.

The Court thereupon stated [R. 21] that if necessary he would issue a bench warrant.

That counsel for defendant put in a long distance call to San Diego, and ascertained that Mr. Cordeau was ill in bed.

That on the following day, of the trial, October 31, 1946, counsel requested that a bench warrant be issued for the appearance of said material witness.

The proceedings were as follows [R. 175]:

“The Court: Counsel, you have filed a statement as to what you expect to prove by him.

Miss Zacsek: Yes.

The Court: I told you yesterday morning I would issue a bench warrant for the witness, but if we were to do so now it would simply mean a continuance of this case. You have filed a statement as to what you expect him to testify to?

Miss Zacsek: Yes.

The Court: And the court will direct that that statement be filed, because if he were here the court would not permit him to so testify, on the ground it would be incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

Miss Zacsek: Yes, your Honor.

The Court: And furthermore that it is simply corroborative of other testimony that has been introduced in this court. I do not feel it is necessary under these circumstances to order a continuance. The statement shows that he did not contact the defendant until the early part of 1946.

Miss Zacsek: '45, your Honor. If I put in '46 it is an error. I typed it myself in a state of great stupor and exhaustion last night.

The Court: And the statement is on my desk. I will file it with the clerk.

Miss Zacsek: I have my own copy. Just a moment, please. I beg the court's pardon, I ask leave to correct that. Having written it myself, I ask it be corrected to show April 1945 and not 1946.

The Court: All right, we will correct it and file it. The ruling still stands. Any further witnesses?"

The Constitution guarantees an accused in a criminal case the right to have the process of the court to compel the attendance of witnesses in his behalf.

Cal. Const. Art. I, Sec. 13.

This guaranty necessarily implies that a defendant be accorded a reasonable time to secure the attendance of his witnesses.

People v. Bossert, 14 Cal. App. 111.

That a continuance of the trial for that purpose be granted upon a proper showing.

People v. Fong Chung, 5 Cal. App. 587.

That upon a proper demand the compulsory process of the Court issue to secure the personal presence of witnesses, provided the testimony of such witness is material to defendant's case, and the witness is physically able to attend.

People v. Bossert, 14 Cal. App. 111;

People v. Marseiler, 70 Cal. 98;

People v. Saenz, 50 Cal. App. 383.

The testimony of Eugene Cordeau, Sr., was material in the following respects:

1. He was a member of Local Board No. 168, National City, California, and any communications between him and appellant's Local Board No. 199 in Los Angeles, or the Director of Selective Service, would come within the purview of Regulations Nos. 642.21, and 642.15.

2. That the testimony of this witness negatives the specific intent of evading service in the armed forces of the United States.

3. That it is corroborative of appellant's testimony.

4. That it is further a chain in the evidence showing the state of the appellant's mind.

5. That having acted as a liason officer between the United States and Mexico for approximately twenty-five years, this witness would be qualified as an expert in an interpretation of the administration of the treaty of January 22, 1943, between the United States and Mexico.

Wherefore, appellant prays for a reversal of the judgment.

Respectfully submitted,

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HOWARD A. LEVINE,

Attorneys for Appellant.

No. 11471

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PETE GARCIA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

JUL 1 1947

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APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 311). The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41(2)). The offenses charged were committed in the City of Los Angeles, State of California, in that defendant's board was located therein [R.¹ 88, 92-3, 28]. Judgment was entered on October 31, 1946 [R. 7-8]. Notice of Appeal was filed on November 8, 1946 [R. 16-17]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹References preceded by the symbol "R" are to the printed Record on Appeal.

Statutes and Regulations Involved.

A. Section 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 311) provides, in part:

“* * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, * * *

B. The Selective Service Regulations provide:

“633.21 *Duty of registrant to report for and submit to induction.* (a) When the local board mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in

such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

Other portions of the regulations which are discussed throughout this brief are set forth for convenience in Appendix A of this brief.

Statement of the Case.

The Grand Jury sitting at Los Angeles returned an indictment in two counts, which was filed in the United States District Court for the Southern District of California, Central Division, on August 21, 1946, charging appellant with violations of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 311), [R. 2-3]. This statute will be referred to hereinafter as the Act.

Count One charged that the appellant failed to report for induction as so notified and ordered to do [R. 2-3]. Count Two charged the appellant with evading service in the Armed Forces of the United States by leaving the United States and going to Mexico [R. 3].

Trial was had on appellant's plea of not guilty to both counts on October 30 and 31, 1946, and the jury returned a verdict of guilty on both counts on October 31, 1946 [R. 4, 7]. The District Court thereupon sentenced appellant to imprisonment in a penitentiary for two years on each count, the periods to begin and run concurrently [R. 8].

Statement of Facts.

Appellant was born in Mexico on August 12, 1919 [R. 96]. His parents moved to the United States in 1923, bringing him with them [R. 96] and he attended Los Angeles public schools until he was eighteen [R. 87], and then worked in and around Los Angeles [R. 87-88]. He is married and has three children [R. 120]. His residence in the United States was unbroken from 1923 until October 30, 1942, but he has never become a citizen or declared his intention of becoming a citizen [R. 97-98].

Appellant registered on October 16, 1940, at Local Board No. 199 for Los Angeles County [Gov. Ex. 4, R. 88]. On October 19, 1942, appellant was classified 1A by his board, and Notice of Classification mailed him [Gov. Ex. 5, R. 64]. An Order to Report for Induction on November 9, 1942, was sent to appellant and was received by him on about October 23, 1942 [Gov. Ex. 6, 9, 10, Deft. Ex. B; R. 88, 92-3, 119].

After receiving the Order, appellant, on October 30, 1942, crossed the border into Mexico, and did not come back into the United States until July 14, 1946 [Gov. Ex. 9, 10; R. 88-9, 93-4].

As to Count One, the failure to report for induction, all the allegations of the indictment were stipulated to by appellant's counsel, except the question of intent, willfulness, and knowledge [R. 36]. As to Count Two, the evidence was not disputed as to the date that appellant went to Mexico, the date of his return to the United States, and the fact that he was in Mexico during the entire interval.

Appellant admitted on various occasions that he went to Mexico on October 30, 1942, to avoid service in the Armed Forces of the United States. He admitted it in a signed statement to an agent of the Federal Bureau of Investigation [Gov. Ex. 9, R. 88]; in a signed statement to an Immigration Inspector [Gov. Ex. 10, R. 93]; in a signed application for a visa to come from Mexico to the United States [Deft. Ex. B, R. 119]; and in the course of his testimony in open court in this case [R. 107]. In interviews with officers of the United States Probation Office, appellant confessed a feeling of guilt while he was in Mexico [R. 42-3, 55, 61, 75].

On December 23, 1942, in Mexico, appellant signed a paper purporting to be an enlistment in the Mexican Army [Deft. Ex. F; R. 110, 171-172]. However, appellant never at any time served in the Armed Forces of Mexico [R. 132, 133], nor did he at any time ever make any request to Local Board No. 199 for permission to serve in the Armed Forces of Mexico [R. 131-132].

Summary of Argument.

Appellant's specifications of error fall into four groups:

I. The failure of the Court to give requested instructions concerning portions of the Act and Selective Service Regulations dealing with the rights and duties of aliens (Specifications of Error Nos. 1-5, A. B.² 6-7, 11-16).

II. The failure of the Court to give a requested instruction on a Treaty between United States and Mexico relating to the military service of nationals of either residing in the other (Specification of Error No. 6, A. B. 8, 17-21).

III. The failure of the Court to give a requested instruction on a Selective Service Regulation relating to delinquent registrants (Specification of Error No. 7, A. B. 8-10, 22-24).

IV. The refusal of the Court to continue the case for the purpose of permitting a witness offered by appellant to be present, and the refusal of the Court to admit in evidence a written offer of proof as to such witness's testimony (Specification of Error No. 8, A. B. 10, 24-27).

²References preceded by the symbol "A. B." are to Appellant's Opening Brief.

ARGUMENT.

I.

The Court Properly Refused to Give the Requested Instructions Dealing With the Rights and Obligations of Aliens Under the Act.

The first Specification of Error (A. B. 6) merely states that the District Court failed to instruct the jury on all the statutes and regulations involved in the case, but no statutes or regulations so omitted are specified by appellant, other than those set forth in subsequent Specifications of Error.

Specifications of Error Nos. 2 and 4 (A. B. 6-7) deal with refusals of the District Court to give requested charges as to the exemption of aliens from the Act; and Specifications of Error Nos. 3 and 5 (A. B. 6-7) deal with refusals of the District Court to give requested charges to the effect that the Act and regulations did not set up norms or standards for determining whether persons were in exempted categories or entitled to certificates of non-residence. None of these are well taken.

The Act makes residence of non-citizens the primary test of their liability thereunder. Section 2 of the Act (50 U. S. C. App. 302), begins: "Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States", who falls between certain ages, to register.

Section 3(a) of the Act as originally enacted in 1940 (Act of September 16, 1940, c. 720, Sec. 3(a), 54 Stat. 885), began: "Except as otherwise provided in this Act, every male citizen of the United States, and every male alien residing in the United States who has declared his

intention to become such a citizen” between certain ages is liable for training and service in the Armed Forces. It was only after Pearl Harbor that Section 3(a) was amended to read “Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * *” (Act of Dec. 20, 1941, c. 602, Sec. 2, 55 Stat. 845). Thus, by this amendment, aliens residing in the United States who had not declared their intention to become citizens of the United States became for the first time liable for service, unless otherwise exempted in the Act, though they had always been required to register.

By the same amendment (Act of Dec. 20, 1941, c. 602, Sec. 4, 55 Stat. 845), Sec. 5(a) of the Act, which listed certain categories of persons who were to be exempt from training and service, was amended. As so amended, Sec. 5(a) listed as exempt the following, the 1941 amendment consisting of the insertion of the single italicized phrase:

“* * * and diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, *and persons in other categories to be specified by the President*, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, * * *”

No blanket exemption of aliens such as appellant from registration and service was ever issued by the President. Procedures were provided for in the regulations, however, whereby an alien who had not declared his intention of becoming a citizen of the United States could obtain a determination as to whether or not he was “a male person residing in the United States” within the Act. These

procedures consisted of an Alien's Application for Determination of Residence, made to his Local Board, and the issuance of either an Alien's Certificate of Nonresidence, or a Notice of Determination of Alien's Residence. These procedures are contained in Sections 611.13, 611.21, 611.21-1, and 611.22 of the Selective Service Regulations, which are set forth in an Appendix to this Brief, and pertinent portions of which were included in the charge of the District Court [R. 186-188]. There is no evidence that the appellant ever sought such a determination.

Thus, from the law and the facts it is clear that the appellant was subject to registration and service under the Act. His residence in the United States was continuous and unbroken for 17 years when he registered, and for 19 years when he was ordered to report for induction. The Act made residence of aliens the test of liability to service, and nowhere were aliens such as the appellant exempted by Presidential proclamation. Even if appellant had availed himself of the procedures for obtaining a determination of his residence by Selective Service, it is inconceivable that any result could be reached but that he was a resident.

When each Specification of Error is considered separately, it is clear that the ruling of the District Court was correct in each instance. Appellant's Proposed Instruction No. 5 [R. 10, Specification of Error No. 2] merely states that aliens must register unless they fall within the classes exempted by Section 5(a) of the Act. The Dis-

strict Court read this Section of the Act to the jury in his charge [R. 185-186].

Appellant's Proposed Instruction No. 7 [R. 11, Specification of Error No. 4], is a mis-statement of the statute, for it would exempt all aliens who have not declared their intentions to become citizens of the United States from the Act, irrespective of residence, whereas the contrary is clear, as is pointed out above.

Appellant's Proposed Instructions Nos. 6 and 8 [R. 11, 12, Specifications of Error Nos. 3 and 5] raise the question of whether any standards are prescribed in the Act or Regulations to determine whether or not a person is in one of the "other categories" or is a resident of the United States. As indicated above, the President never exempted from the Act any specific category of persons residing in the United States which would include the appellant. Likewise, it is difficult to conceive of any definition of "residence" under which appellant would be anything but a resident of the United States. Appellant was not entitled to a Certificate of Nonresidence, and he never even applied for one. For these reasons the regulations thereon were not material or relevant to the issues in the case. Such charges that the District Court did give on the subject were adequate [R. 186-188]. Furthermore, the use of "residence" as a test for imposing legal duties and obligations is widespread in our jurisprudence. It is a word of art much construed. Any attempt to draw a finer distinction in regulations would take away the flexibility desirable to meet different factual situations.

II.

The Court Properly Refused to Give a Requested Instruction Construing the Treaty Between Mexico and the United States.

Appellant's Proposed Instruction No. 9 [R. 12, Specification of Error No. 6] is a summary of provisions of a Treaty between the United States and Mexico, relating to military service of nationals of each residing in the other.

Section IX of the Treaty between Mexico and the United States provided:

"Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired." (57 Stat. 973, 976.)

Appellant never fell within the provisions of this treaty. There is no evidence he was ever "designated" by Mexico. He was never called for service in Mexico [R. 132, 133]. He left the United States to avoid the draft by his own admissions, and the crime complained of in the indictment was completed before he ever even signed the so-called enlistment papers in Mexico.

Further, Section 633.91 of the Regulations provides that a registrant may request a transfer to the armed forces of another country at any time prior to induction.

This regulation was read to the jury by the District Court in its charge [R. 188-9]. Appellant never requested such a transfer [R. 131-2]. Appellant's so-called enlistment in the Mexican Army was obviously only an afterthought and an attempt to mitigate the seriousness of the crime already committed.

In the case of *Stumpf v. Sanford*, 145 F. (2d) 270, 271 (C. C. A. 5th, 1944), cert. den. 324 U. S. 876, the Court, in a dictum, stated that enlistment in the Canadian Army was not a defense to a charge of failure to notify a draft board of change of address, where the defendant had never reported such enlistment to his draft board, nor made claim to the Draft Board of exemption from Selective Service Regulations because of such enlistment.

III.

The Court Properly Refused to Give a Requested Instruction Embodying the Regulation Dealing With Delinquent Registrants.

Appellant's Proposed Instruction No. 15 [R. 14, Specification of Error No. 7] consists of Selective Service Regulation 642.21, dealing with the procedure to be followed for the delivery of delinquent registrants. A mere reading of this requested instruction demonstrates its complete irrelevancy.

Further, Section 642.2 of the Regulations which deals with delinquent registrants, provides:

“Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by this part of the Selective Service Regulations is not a condition precedent to the prosecution of any person under the provisions of section 11 of the Selective Training and Service Act of 1940, as amended.”

IV.

**The Court Properly Excluded the Proposed Testimony
of Eugene Cordeau, Sr.**

Specification of Error No. 8 deals with the refusal of the District Court to continue the trial in order to permit Eugene Cordeau, Sr., to testify, and in refusing to admit a written offer of proof as to what his testimony would be. The testimony referred to related to conversations between appellant and Cordeau in Mexico between April, 1945 and appellant's reentry into the United States, and to steps taken by Cordeau on appellant's behalf [R. 4-6]. This testimony is clearly irrelevant and immaterial since it is of occurrences and conversations long after the crimes charged in the Indictment were committed. It is also incompetent because it consists of self-serving declarations of appellant. In the case of *Pacman v. United States*, 144 F. (2d) 562, 563 (C. C. A. 9th, 1944), cert. den., 323 U. S. 786, this Court sustained a ruling of the lower court excluding from evidence a lengthy letter written by the defendant to the State Director of Selective Service after he had received an Order to Report for Induction. The Court held that the letter was clearly self-serving and could throw no light on the question of intent, since the only intent involved was the intent to disobey the Order of the Local Board. In the present case the appellant has admitted on the stand what his intent was, and his self-serving declarations made at some other time out of court are clearly incompetent.

The testimony of Cordeau was also offered to explain the Treaty between the United States and Mexico, discussed under Point II above, and to relate steps taken and communications sent and received between Cordeau and the

appellant's local board concerning appellant's delinquency. Both of these matters, as pointed out under Points II and III above, respectively, are clearly immaterial, irrelevant and incompetent.

Conclusion.

It is clear from the record that the appellant had a fair and full trial. The only disputed fact was as to appellant's intent, and his own admissions and testimony leave no doubt that his intent was to avoid the draft. The points raised by appellant either deal with matters occurring long after the crime charged was committed, or seek to question appellant's status as an alien under the Act and Regulations. The first are clearly irrelevant, immaterial, and incompetent, and the latter have no basis in fact or law. Wherefore, appellee respectfully prays that the judgment of conviction be affirmed.

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United States Attorney,

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APPENDIX A.

I. ALIENS.

611.13 *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, provided:

(1) He is a diplomatic representative, a technical attache of a foreign embassy or legation, a consul general, a consul, a vice consul, or a consular agent of a foreign country; or

(2) He is a full time official or employee of a foreign government and a national of the country employing him who has been notified to the Department of State; provided that at the time he is notified to the Department of State, a proper representative of his government advises and after investigation the Department of State and the Director of Selective Service agree that he is in fact not residing in the United States; or

(3) The Secretary of State and the Director of Selective Service agree that he is a full time official or employee of a recognized public international organization, who has entered the United States for the sole purpose of engaging in such employment and has been so engaged continuously since his arrival here, or has at all times during his stay in the United States and prior to his employment by such recognized public international organization been exempt from training and service under the Selective Training and Service Act of 1940, as amended.

(4) He is a dependent male child under twenty-one years of age of any person described in subparagraphs (1), (2), or (3) of this paragraph; or

(5) He is and was at the time of his entry into the United States in the active service of the armed forces of a cobelligerent or a neutral country; or

(6) He is an individual designated, or is within a group of individuals described, by the Director of Selective Service as not required to present himself for and submit to registration; or

(7) He has, within the time prescribed and in the manner provided in section 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Non-residence (Form 303) which has not expired.

(b) Each alien in one of the categories described in subparagraphs (1), (2), (3), (4), (5), or (6) of paragraph (a) must have in his personal possession, at all times, an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration and must exhibit it in the same manner and to the same persons as a registrant is required to exhibit a Registration Certificate (Form 2) under section 617.1.

II. PROCEDURE FOR DETERMINING WHEN ALIEN IS RESIDING IN THE UNITED STATES.

611.21 What aliens may apply for a determination. Any nondeclarant alien who has entered or who hereafter enters the United States in a manner prescribed by its laws, except a nondeclarant alien described in subparagraphs (1), (2), (3), (4), (5), and (6) of section 611.13, may file with his local board, if he is registered, or with the local board where he is at the time located, if he is not registered, an Alien's Application for Determination of Residence (Form 302); provided, that such application is filed within 90 days after the date of his entry into the United States or within 90 days after persons of his age become liable for training and service by law, whichever is the later; and provided further, that such application is filed prior to induction. An Alien's Personal History and Statement (Form 304) must be filed with such application.

611.21-1 Application filed after 3 months. Any alien who has not complied with the provisions of section 611.21 or section 611.26 may file an Alien's Application for Determination of Residence (Form 302) and an Alien's Personal History and Statement (Form 304) with a local board for transmittal to the Director of Selective Service for consideration.

611.22 Determination by local board. (a) As soon as possible after an alien who is entitled to do so files with the local board an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), the local board shall determine whether such alien is "a male person residing in the United States" within the meaning of section

2 and section 3 of the Selective Training and Service Act of 1940, as amended.

(b) If the local board determines that such alien is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, it shall mail to such alien a Notice of Determination of Alien's Residence (Form 305).

(c) If the local board determines that such alien is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, it shall also determine the period of time such alien may continue to remain in the United States without becoming "a male person residing in the United States" and the last day of any period thus determined shall be known as the expiration date.

(d) When the determination referred to in paragraph (c) of this section has been made by the local board, it shall (1) prepare an Alien's Certificate of Nonresidence (Form 303), recording thereon the expiration date; (2) notify the alien to report to the office of the local board; and (3) require the alien, when he reports, to sign the Alien's Certificate of Nonresidence (Form 303) in the presence of a member or the clerk of the local board. The member or the clerk of the local board in whose presence the alien signs the Alien's Certificate of Nonresidence (Form 303) shall then sign the certificate on behalf of the local board and shall deliver the certificate to the alien. If the alien has registered, he shall be required to surrender his Registration Certificate (Form 2) to the local board before such member or clerk delivers the Alien's

Certificate of Nonresidence (Form 303) to him. If the alien has registered and delivers his Registration Certificate (Form 2) to the local board, such Registration Certificate (Form 2) and the Registration Card (Form 1) for the alien shall be canceled by marking across the faces thereof the words "Canceled-Nonresident Alien," and each such canceled Registration Certificate (Form 2) and such canceled Registration Card (Form 1) shall be retained in the files of the local board.

611.23 Appeal to Director of Selective Service from local board's determination. (a) At any time within 10 days after the local board mails to an alien a Notice of Determination of Alien's Residence (Form 305), such alien may appeal to the Director of Selective Service from the determination of the local board that he is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended. Such appeal may be taken by such alien by filing a signed written statement that he appeals from such determination or by signing and filing the statement of appeal on the Notice of Determination of Alien's Residence (Form 305). When such an appeal is filed by the alien, he may at the same time, file such additional information as he wishes to call to the attention of the Director of Selective Service.

(b) The Director of Selective Service or the State Director of Selective Service may appeal to the Director of Selective Service at any time from any determination of the local board made under the provisions of section 611.22. Either the Director of Selective Service or the State Director of Selective Service may take such an appeal by filing with the local board a written statement that he appeals.

(c) When an appeal from a determination made by the local board under the provisions of section 611.22 is taken, the local board shall transmit the entire file of the alien, through the State Director of Selective Service, to the Director of Selective Service, retaining in its record only a copy of the letter or transmittal listing the items contained in the file which is forwarded.

Sections 611.23, 611.24 and 611.25 of the Regulations provide respectively for appeals from determinations of the local board to the Director of Selective Service, for the Director's determination of the issue, and for the action to be taken by the local board to notify the alien on receipt of the Director's determination. Section 611.26 provides for an alien's second or subsequent application for a determination.

611.27 Effect of pending application. When an alien is entitled to and does file an Alien's Application for Determination of Residence (Form 302), he is not required to present himself for and submit to registration during the period when such application is being considered by the local board; during the period within which an appeal may be taken from the determination of the local board to the Director of Selective Service; or, if an appeal is taken, during the period the Director of Selective Service is considering the appeal.

611.28 Effect of determination. Every alien who is entitled to and does file an Alien's Application for Determination of Residence (Form 302) shall be "a male person residing in the United States" within the meaning

of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, when:

(1) The local board has determined that he is such "a male person residing in the United States" and he does not take an appeal to the Director of Selective Service from such determination within the 10-day period in which he is permitted to do so.

(2) The Director of Selective Service has determined that he is such "a male person residing in the United States."

(3) Either the local board or the Director of Selective Service has determined that he is not such "a male person residing in the United States" and he remains in the United States after the expiration date; provided that when such alien files a second or subsequent Alien's Application for Determination of Residence (Form 302) before the expiration date, he shall not be considered to be such "a male person residing in the United States" either while such second or subsequent application for a determination is pending or during any further period for which a new Alien's Certificate of Nonresidence (Form 303) is issued as a result of the determination thereon.

III. COBELLIGERENT ALIENS

633.91 *Induction and subsequent classification of cobelligerent aliens.* (a) At any time prior to his induction into the land or naval forces of the United States, a registrant who is not a citizen of the United States and who

has not declared his intention to become a citizen of the United States but who is a citizen or subject of a cobelligerent nation may request and be permitted to be inducted into the armed forces of such cobelligerent nation, provided an agreement has been entered into between the United States Government and the government of such cobelligerent nation, the terms of which permit such induction and give to citizens or subjects of the United States residing in such cobelligerent nation a reciprocal right to serve in the land or naval forces of the United States.

(b) The manner in which, the time when, and the place where a request may be made by such registrant and the procedure to be followed in order for such registrant to be inducted into the armed forces of the cobelligerent nation of which he is a citizen or subject shall be prescribed by the Director of Selective Service.

(c) When such registrant files a request for induction into the armed forces of the cobelligerent nation of which he is a citizen or subject and fails to report for or to be inducted into the armed forces of such cobelligerent nation, he shall, if acceptable, be inducted into the armed forces of the United States when his order number is reached.

(d) When it has been determined that any registrant has been inducted into the armed forces of a cobelligerent nation in the manner in this section provided, his classification shall be reopened and he shall be placed in Class I-G.

IV. DELINQUENCY

642.2 *Compliance with procedures of this part* [dealing with delinquent registrants] *not condition precedent to prosecution.* Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by this part of the Selective Service Regulations is not a condition precedent to the prosecution of any person under the provisions of section 11 of the Selective Training and Service Act of 1940, as amended.

V. DELIVERY OF DELINQUENT REGISTRANTS

642.21 *Procedure.* (a) If a delinquent reports or is brought before a local board other than his own local board, the local board to which he reports or before which he is brought shall advise his own local board by telegram or other expeditious means that the delinquent has reported to or has been brought before such local board and that he will be inducted or assigned to work of national importance, as the case may be, if it is satisfactory to his own local board. The registrant's own local board shall reply by telegram or other expeditious means.

(b) If the registrant's own local board advises or if it is ascertained from the United States Department of Justice that the registrant is delinquent because he has failed to respond to an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50), the delinquent shall be delivered for induction or steps taken to assign him to work of national importance, and the local board to which the registrant has reported or before which he has been brought shall prepare such papers as may be necessary in order to effect

such induction or assignment and forward copies thereof to the registrant's own local board. The induction or assignment of such a registrant shall be reported to the registrant's own local board in the same manner as if the registrant had been transferred for delivery to the local board from which such registrant was inducted or assigned.

(c) If the registrant's own local board advises that an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) has not been issued to such registrant or that the registrant is no longer a delinquent, it shall advise the local board before which the registrant has appeared or has been brought of the action to be taken with reference to such registrant.

see V. 2456

No. 11483

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellees,

and

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

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TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME I

(Pages 1 to 320, Inclusive)

Upon Appeals from the District Court of the United States
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Central Division

FILED

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PAUL P. O'BRIEN,

CLERK

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants and Cross-Appellees:

DESSER, RAU & CHRISTENSEN

325 West Eighth Street

Los Angeles 14, Calif.

For Appellees and Cross-Appellants:

PACHT, PELTON, WARNE, ROSS &
BERNHARD

9700 Wilshire Boulevard

Beverly Hills, Calif. [1*]

In the District Court of the United States
Southern District of California
Central Division

No. 4328-O'C

LARRY FINLEY,

Plaintiff,

vs.

MUSIC CORPORATION OF AMERICA, a Delaware
corporation; JULES C. STEIN; H. E. BISHOP;
LAWRENCE BARNET, DOE ONE, DOE TWO,
DOE THREE, DOE FOUR, DOE FIVE, DOE SIX,
DOE SEVEN, and DOE EIGHT,

Defendants.

COMPLAINT FOR DAMAGES AND INJUNCTION,
UNDER SHERMAN ANTI-TRUST ACT
(Act of July 2, 1890; 26 Stat. 209)

Plaintiff complains of defendants above-named and for
cause of action alleges:

I.

Plaintiff is now, and ever since the 3rd day of January, 1945, has been, the Operator under a three-year lease from the City of San Diego, State of California, of a certain Amusement Park in the said City of San Diego known as "Mission Beach Amusement Park," and of the Mission Beach Ballroom, an adjunct of said amusement park; said written lease has approximately two (2) years and nine (9) months to run before the term thereof expires. [2]

II.

One Wayne Dailard is now, and for a long time last past has been, the owner and operator of a certain ball-room in the City of San Diego, California, known as "Pacific Square"; and said Dailard was for a period of five (5) years and until the 31st day of December, 1944, the Lessee from the City of San Diego and the Operator of said Mission Beach Amusement Park and said ball-room in said Mission Beach Amusement Park.

III.

Defendant Music Corporation of America is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in the City of Chicago, State of Illinois. Said corporation is now, and at all times since the month of April, 1938, has been qualified, licensed, and authorized to transact and do business in the State of California, and maintains an office in the City of Beverly Hills, State of California.

Defendant Jules C. Stein is now, and at all times herein mentioned was, the President of defendant Music Corporation of America, and resides in the City of Beverly Hills, California.

Defendant H. E. Bishop is now, and at all times herein mentioned was, an agent, employee, and servant of defendant Music Corporation of America, and occupies the Position with his said employer known as "orchestra broker."

Defendant Lawrence Barnet is now, and at all times herein mentioned was, an agent, employee, and servant of defendant Music Corporation of America and the Vice-President in charge of orchestras.

Defendants Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven, and Doe Eight are agents, servants, employees, officers, and directors of defendant Music Corporation of America, and are sued herein under said fictitious names for [3] the reason that plaintiff does not now know their true names or capacities, and plaintiff asks leave of Court to amend this complaint and insert such true names and capacities when the same become ascertained by him.

IV.

Defendant Music Corporation of America is engaged in the business of acting as personal representative and employment agent for many persons in the entertainment industry in the United States and is engaged in carrying on an extensive interstate business in the representation as such personal representative and agent for many artists and organizations in various fields of entertainment. In the course of its said representation and agency said defendant transports between the several states of the United States not only the various members of entertainment groups, dance bands, vocal organizations, and the like, but in connection therewith transports between the several states large quantities of costumes, musical instruments, musical arrangements, and other paraphernalia of the entertainment business, all of which are equally, if not more important than the personnel involved in such transactions. In particular, said defendant is now, and for many years last past has been, the personal representative and agent for employment purposes of approximately ninety-five percent (95%) of all "name" bands, and the owners, directors, and leaders of such "name" bands within the United States. By "name" bands, as used herein, is

meant dance bands and orchestras who engage in fields of entertainment such as radio, motion pictures, theatrical, and ballrooms, and the names of whose leaders are renowned and well known to the general public throughout the United States and internationally. Included within the "name" bands represented by said defendant are the following: Harry James, Tommy Dorsey, Jan Garber, Ted Fiorito, Gene Krupa, Ted Lewis, Benny Goodman, Kay Kyser, [4] Sammy Kaye, Freddy Martin, Guy Lombardo, Xavier Cugat, Charlie Barret, Jack Teagarden, Bob Chester, Phil Harris, Skinnay Ennis, Joe Reichman, Louis Armstrong, Les Brown, Bernie Cummins, Al Donahue, Henry King, Harry Owens, and Tommy Tucker.

V.

Defendant Music Corporation of America and said Wayne Dailard have heretofore entered into, and there is now in full force and effect, an agreement whereby said Wayne Dailard shall have the exclusive right to employ and use the artists and "name" bands represented by defendant Music Corporation of America within San Diego County, State of California; and defendants and each of them, and said Wayne Dailard, have unlawfully engaged in a combination and conspiracy in violation of the provisions of the Act of Congress passed July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and are engaged in such combination and conspiracy to place unlawful restraint upon the trade and commerce of musical entertainment between the several states and territories of the United States.

VI.

As an example of some of the acts and things done by defendants, and each of them, and said Wayne Dailard, in carrying out said unlawful combination and conspiracy, plaintiff alleges that defendants, and each of them, and said Wayne Dailard, have done or caused to be done the following acts and things and adopted the courses of conduct hereinafter described:

A. In or about the month of November, 1944, plaintiff was advised by the City of San Diego, that he had been awarded a lease upon said Mission Beach Amusement Park and Mission Beach Ballroom, for a period of three (3) years commencing January 3, 1945; plaintiff immediately thereupon commenced negotiations with defendant Music [5] Corporation of America and its officers, agents, and employees, hereinabove referred to, for the purpose of obtaining the services of the "name" bands controlled by said defendants at said Mission Beach Ballroom, and defendant Music Corporation of America and its said officers, agents, and employees agreed to supply to plaintiff said "name" bands at prices currently being offered to other ballrooms. In reliance thereon, plaintiff undertook the preparation of said Mission Beach Ballroom for a grand opening on the 3rd day of February, 1945, and continuously during the months of December, 1944, and January, 1945, requested of defendant and its said agents, servants, and employees that he be advised of the identity of the "name" band who would be supplied for said grand opening. Said defendant and its said agents, servants, and

employees, consistently refused to furnish plaintiff with the information requested or to offer to him any "name" band, or any band, or any musical entertainment for said purpose.

B. During the early part of the month of February, 1945, plaintiff personally, and through his attorneys, advised defendant Music Corporation of America that he intended to commence an action against it under the Sherman Anti-Trust Act, and immediately thereafter and on or about the 23rd day of February, 1945, defendant Music Corporation of America and its agents, servants, and employees, offered to book Jack Teagarden at plaintiff's said ballroom at a price of Twenty-two Hundred and Fifty Dollars (\$2,250), minimum guarantee against fifty per cent (50%) of the gross receipts to be taken in by said ballroom for a two-night engagement. Plaintiff is informed and believes and therefore alleges, that the price at which said defendants quoted [6] Jack Teagarden and his orchestra to plaintiff was substantially higher than the current price to other ballrooms of the size and character similar to that of plaintiff for said "name" band.

C. From time to time during the months of January and February, 1945, plaintiff advised defendant Music Corporation of America and its said agents, servants, and employees, of various "name" bands he desired to engage for performances at his said ballroom, and in each of said instances, the "name" band indicated by plaintiff to said defendants as desirable was subsequently booked into said ballroom operated by said Wayne Dailard.

D. On or about the 20th day of January, 1945, defendant Music Corporation of America and its agents, servants, and employees, offered to book the King Sisters, a vocal quartet, for plaintiff's said ballroom, on February 10 and February 11, 1945, at a price of One Thousand, Five Hundred Dollars (\$1,500) for both nights. Plaintiff accepted said offer and daily thereafter requested of said defendants that the contracts for said booking be forwarded to him. Plaintiff received no reply from said defendants, and on or about the 25th day of January, 1945, plaintiff was advised by reading an advertisement in the San Diego Newspapers, that said King Sisters were booked into said Pacific Square, the ballroom operated by said Wayne Dailard, for an engagement on the 2nd to 4th days of February, 1945.

E. Plaintiff is informed and believes, and upon such information and belief alleges, that as to the few "name" bands not controlled by defendant Music Corporation of America said defendant and its officers, agents, servants, and employees have through means and methods unknown to plaintiff exerted pressure and influence upon the personal representatives [7] and employment agents for said few remaining "name" bands, compelling them to refrain from and refuse to offer said "name" bands for bookings at plaintiff's said ballroom other than at prices very substantially higher than the current prices commanded by said "name" bands at other ballrooms of the size and character similar to that of plaintiff.

F. Plaintiff is informed and believes, and upon such information and belief alleges, that defendant Music Corporation of America has and maintains exclusive contracts for various localities with many other ballrooms, one in each of such localities, similar to the arrangement between said defendant and said Wayne Dailard in the County of San Diego, California; and plaintiff is further informed and believes, and upon such information and belief alleges, that defendant Music Corporation of America, through means and methods unknown to plaintiff, compels other personal representatives and employment agents to split fees with it upon bookings of clients of said other personal representatives and employment agents in said ballrooms with whom said defendant has exclusive agreement in said various localities.

G. On or about the 27th day of February, 1945, defendant Music Corporation of America and its said agents, servants, and employees, offered to book Ted Fiorito and his orchestra at plaintiff's said ballroom, at and for a price of Two Thousand, Five Hundred Dollars (\$2,500), minimum guarantee against fifty per cent (50%) of the gross receipts for a two-night engagement. Plaintiff is informed and believes, and upon such information and belief alleges, that said price so quoted is very substantially in excess of the price currently being asked [8] for such orchestra of other ballrooms of a size and character similar to that of plaintiff.

VII.

As a result of the combination and conspiracy hereinbefore alleged, and of the various acts done in pursuance thereof by defendants, and each of them, plaintiff has been unable to obtain first-class musical entertainment and "name" bands for appearances and exhibitions at the said Mission Beach Ballroom at the said Mission Beach Amusement Park in the City of San Diego, California, and has been restricted in his trade and competition with other ballrooms in said City of San Diego; all of which was and is injurious to plaintiff and excluded plaintiff from competition in the trade, and because of such inability to compete by reason of the foregoing, he has been damaged in that his business has been rendered unprofitable, and will continue to be rendered unprofitable during the remainder of the term of his said lease: all to his damage in the sum of One Million Dollars (\$1,000,000.00); and plaintiff is entitled under the laws of the United States, to wit, Section 7 of the Sherman Law above referred to, to recover three-fold his actual damages, to wit, the sum of Three Million Dollars (\$3,000,000.00).

VIII.

Plaintiff, in order to enforce his rights against the defendants, has employed the services of Messrs. Dessert, Rau & Christensen, a firm of attorneys in the City of Los Angeles, State of California, the members of whom are all licensed and authorized to practice before the

District Courts of the United States, and under the laws of the United States, [9] to wit, Section 7 of the Sherman Act, plaintiff is entitled to recover from defendants a reasonable attorneys' fees, and that reasonable attorneys' fees in this action is the sum of One Hundred Thousand Dollars (\$100,000).

IX.

There is a diversity of citizenship of the parties in this action, and by reason thereof and by reason of the provisions of Chapter 648 of the United States of 1890 and the Acts amendatory thereto, this Court has jurisdiction of the parties hereto and the subject matter of this action.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of One Million Dollars (\$1,000,000) as damages, and that said sum be trebled in accordance with the provisions of Section 7 of the Act of July 2, 1890, 26 Stat. 209; for reasonable attorneys' fees in the sum of One Hundred Thousand Dollars (\$100,000); and for costs of suit herein incurred.

DESSER, RAU & CHRISTENSEN

By Arthur A. Desser

Attorneys for Plaintiff [10]

[Verified.]

[Endorsed]: Filed Mar. 20, 1945. [11]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT OF DEFENDANTS
MUSIC CORPORATION OF AMERICA, JULES
C. STEIN, H. E. BISHOP AND ~~LAWRENCE~~
~~BARNET~~ LAWRENCE R. BARNETT

Defendants Music Corporation of America, a corporation, (hereinafter referred to as MCA), Jules C. Stein, H. E. Bishop and ~~Lawrence Barnet~~, Lawrence R. Barnett (purs to ord 2/8/46 L.B.F.) jointly and severally answer plaintiff's complaint, and admit, deny and allege as follows:

I.

Answering Paragraph I, defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

II.

Answering Paragraph II, defendants allege that they have no knowledge or information sufficient to form a belief as to the [12] truth of the averments thereof.

III.

Answering Paragraph III, defendants admit that MCA is a Delaware corporation licensed and authorized to do and transact business in the State of California, and that it maintains an office in the City of Beverly Hills, State of California; admit that Jules C. Stein has been and is the president of said MCA and that he resides in the

City of Beverly Hills; admits that defendant H. E. Bishop is an employee and servant of defendant MCA, but deny that he occupies a position with said company known as "Orchestra Broker"; admit that defendant ~~Lawrence Barnett~~ Lawrence R. Barnett [purs to ord 2/8/46 L.B.F.] was and is an employee and vice president of defendant MCA.

IV.

Answering Paragraph IV, defendants admit that defendant MCA is engaged in the business of acting as employment agent for persons who are employed in the entertainment industry in the United States, and admit that defendant MCA has in the past, and is now, acting as employment agent for certain persons who, as leaders or directors of musicians who work together as bands or orchestras, accept and obtain employment to render their services for theatres, ballrooms, dance halls and places of entertainment. Admit that MCA represents as employment agent those certain persons who are such leaders or directors of bands or orchestras and whose names are listed in plaintiff's complaint, Paragraph IV, page 3, line 31, to page 4, line 4. Further answering said paragraph, defendants deny each and every other allegation therein contained.

V.

Answering Paragraph V, defendants deny each and every allegation therein contained. [13]

VI.

Answering Paragraph VI, defendants deny, insofar as it is averred that they or any of them, together with Wayne Dailard or with any other person, are, or at any times were, engaged in or were carrying out any unlawful combination or conspiracy either as alleged in said complaint or otherwise, or at all. By way of answer to the specific sub-paragraphs of said Paragraph VI, defendants state:

(a) Answering sub-paragraph A thereof, defendants admit that plaintiff at some time prior to January 3, 1945, offered to enter into a contract to employ certain bands and orchestras, the persons comprising which the defendant MCA represented as employment agent, and that certain conversations were had between employees of said MCA and said plaintiff concerning said offer. Further answering said sub-paragraph, defendants deny each and every allegation therein contained.

(b) Answering sub-paragraph B, defendants admit that defendant MCA, as employment agent for Jack Teagarden and the musicians who worked together with him as a band or orchestra, offered to contract for the employment of said Jack Teagarden and said musician members of his band at a price of \$2,250.00 as a minimum guarantee, against 50% of the gross receipts, for a two-night engagement. Further answering said sub-paragraph, de-

fendants deny each and every other allegation therein contained.

(c) Answering sub-paragraph C, defendants deny each and every allegation therein contained.

(d) Answering sub-paragraph D, defendants deny each and every allegation therein contained.

(e) Answering sub-paragraph E, defendants deny each and every allegation therein contained.

(f) Answering sub-paragraph F, defendants deny each [14] and every allegation therein contained.

(g) Answering sub-paragraph G, defendants admit that MCA, as employment agent for Ted FioRito and the musicians who worked together with him as a band or orchestra, offered the employment of said Ted FioRito and said musician members of his band at a price of \$2,500.00 minimum guarantee against 50% of the gross receipts for a two-night engagement. Further answering said sub-paragraph, defendants deny each and every other allegation therein contained.

VII.

Answering Paragraph VII, defendants deny each and every allegation therein contained. Defendants specifically deny plaintiff has been damaged by any act or conduct on their part, either as alleged in said complaint, or at all, in the sum of \$1,000,000, or in any other sum or amount whatsoever.

VIII.

Answering Paragraph VIII, defendants deny each and every allegation therein contained.

IX.

Answering Paragraph IX, defendants deny that there is a diversity of citizenship of most of the parties to said action and that all of the defendants except MCA are citizens and residents of the State of California.

SECOND DEFENSE

X.

Defendants aver that said complaint does not, nor does any part thereof, state a claim upon which recovery can be had as against [15] said defendants, or any of them.

Wherefore, defendants pray that plaintiff take nothing by his complaint herein filed; for their costs herein incurred, and for all proper relief.

PACHT, PELTON, WARNE, ROSS & BERNHARD

CLORE WARNE

N. JOSEPH ROSS

LOUIS M. BROWN

Attorneys for Said Defendants

Received copy of the within Answer to Complaint this 2nd day of July, 1945. Dessler, Rau & Christensen.

[Endorsed]: Filed Jul. 2, 1945. [16]

[Minutes: Wednesday, February 6, 1946]

Present: The Honorable Paul J. McCormick, District Judge.

This cause coming on for further jury trial; Wm. H. Christensen, F. Fillmore Jaffe, and L. M. Karp, Esqs., appearing as counsel for the plaintiff; Frank P. Doherty, Clore Warne, and Harold F. Collins, Esqs., appearing as counsel for the defendants; the jury is present and it is ordered that trial proceed.

Attorney Doherty makes a statement and presents written objections of defendants to introduction of records and further evidence re alleged damages suffered by plaintiff, which are filed and entered in the record, and the Court states that rulings heretofore made will stand and that the Court will reserve further rulings at this time. Respective counsel stipulate as to certain interrogatories and answers thereto.

Jack M. Ostrow, a witness for the plaintiff, heretofore sworn, resumes the stand and testifies further on examination by Attorney Doherty.

Eugene A. Hansen, a witness for the plaintiff, heretofore sworn, resumes the stand and testifies further on examination by Attorney Doherty.

At 12 o'clock noon the Court reminds the jury of the admonition heretofore given and recesses to 2 P. M.

Court reconvenes at 2:05 P. M.; all present as before; the jury is present and it is ordered that trial proceed.

Eugene A. Hansen, a witness for the plaintiff, heretofore sworn, resumes the stand and testifies further on examination by Attorney Doherty. [17]

Jack M. Ostrow, a witness for the plaintiff, heretofore sworn, resumes the stand and testifies further on examination by Attorneys Doherty and Christensen.

Eugene A. Hansen, a witness for the plaintiff, heretofore sworn, resumes the stand and testifies further on examination by Attorneys Doherty and Christensen.

At 3:05 P. M. the Court reminds the jury of the admonition heretofore given and declares a recess.

At 3:25 P. M. Court reconvenes; all present as before, except the jury. Court having reconvened with the jury absent and out of hearing of the Court Room, at the request of counsel for the plaintiff, Attorney Christensen moves the Court to permit the plaintiff to file an amended complaint, and presents the said amended complaint to the Court and copy to opposing counsel.

Attorney Collins argues in opposition to the motion. Attorney Christensen argues further.

The Court makes a statement of its views and grants the motion of plaintiff to file amended complaint. The amended complaint is filed by the Clerk.

Attorney Collins makes a statement and it is stipulated and ordered that the defendants' answer to the original complaint may stand as the answer to the amended complaint.

Attorney Doherty makes a statement. The Court makes a further statement of its views.

At 3:57 P. M. the Court directs that the jury be brought into Court, and the jury returns to the Court Room.

Defendants' Exhibit L is offered and admitted into evidence.

At 4 P. M. the Court reminds the jury of the admonition heretofore given and excuses them until 10 A. M., February 7, 1946, and the jury leaves the Court Room.

After the jury leaves the Court Room, Attorney Christensen moves that the action be dismissed as to defendant Jules C. Stein, and it is so ordered. Plaintiff rests. [18]

Attorney Collins, on behalf of the defendants, moves that the Court direct a verdict in favor of the defendants, and presents a written motion to the Court, which is filed.

Attorney Collins argues on said motion.

The Court makes a statement of its views and it is ordered that the motion of defendants for a directed verdict be, and it is, denied, without prejudice.

At 4:40 P. M. court recesses in this trial to 10 A. M., February 6, 1946, and court adjourns. [19]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR DAMAGES AND
INJUNCTION, UNDER SHERMAN ANTI-
TRUST ACT

(Act of July 2, 1890; 26 Stat. 209)

Leave of Court having been first obtained, plaintiffs file herein their First Amended Complaint, and for cause of action allege:

I.

Plaintiffs are, and at all times herein mentioned have been, copartners engaged in business under the fictitious firm name and style of Larry Finley & Associates, and prior to the commencement of the within action, plaintiffs caused to be filed and published a certificate in compliance with the provisions of Sections 2466 and 2468 of the Civil Code of the State of California.

II.

Plaintiffs are now, and ever since the 3rd day of January, [20] 1945, have been, the Operators, under a three-year lease from the City of San Diego, State of California, of a certain Amusement Park in the said City of San Diego known as "Mission Beach Amusement Park," and of the Mission Beach Ballroom, an adjunct of said amusement park; said written lease has approximately two (2) years and nine (9) months to run before the term thereof expires.

III.

One Wayne Dailard is now, and for a long time last past has been, the owner and operator of a certain ballroom in the City of San Diego, California, known as

“Pacific Square”; and said Dailard was for a period of five (5) years and until the 31st day of December, 1944, the Lessee from the City of San Diego and the Operator of said Mission Beach Amusement Park and said ball-room in said Mission Beach Amusement Park.

IV.

Defendant, Music Corporation of America is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in the City of Chicago, State of Illinois. Said corporation is now, and at all time since the month of April, 1938, has been qualified, licensed and authorized to transact and do business in the State of California, and maintains an office in the City of Beverly Hills, State of California.

Defendant Jules C. Stein is now, and at all times herein mentioned was, the President of defendant Music Corporation of America, and resides in the City of Beverly Hills, California.

Defendant H. E. Bishop is now, and at all times herein mentioned was, an agent, employee and servant of defendant Music Corporation of America, and occupies the position with his said employer known as “orchestra broker.”

Defendant ~~Lawrence Barnett~~ Lawrence R. Barnett [purs to ord 2/8/46 L.B.F.] is now, and at all times herein mentioned was, an agent, employee and servant of defendant Music [21] Corporation of America and the Vice-President in charge of orchestras.

Defendants Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven and Doe Eight are agents,

servants, employees, officers and directors of defendant, Music Corporation of America, and are sued herein under said fictitious names for the reason that plaintiffs do not now know their true names or capacities, and plaintiffs ask leave of Court to amend this amended complaint and insert such true names and capacities when the same become ascertained by plaintiffs.

V.

Defendant Music Corporation of America is engaged in the business of acting as personal representative and employment agent for many persons in the entertainment industry in the United States and is engaged in carrying on an extensive interstate business in the representation as such personal representative and agent for many artists and organizations in various fields of entertainment. In the course of its said representation and agency, said defendant transports between the several states of the United States not only the various members of entertainment groups, dance bands, vocal organizations and the like, but in connection therewith transports between the several states large quantities of costumes, musical instruments, musical arrangements and other paraphernalia of the entertainment business, all of which are equally, if not more important than the personnel involved in such transactions. In particular, said defendant is now, and for many years last past has been, the personal representative and agent for employment purposes of approximately ninety-five percent (95%) of all "name" bands within the United States. By "name" bands, as used herein, is meant dance bands and orchestras who engage in fields of entertainment such as radio, motion pictures, theatrical and ballrooms, and the names of whose leaders

are renowned and well known to the [22] general public throughout the United States and internationally. Included within the "name" bands represented by said defendant are the following: Harry James, Tommy Dorsey, Jan Garber, Ted Fiorito, Gene Krupa, Ted Lewis, Benny Goodman, Kay Kyser, Sammy Kaye, Freddy Martin, Guy Lombardo, Xavier Cugat, Charlie Barnet, Jack Teagarden, Bob Chester, Phil Harris, Skinnay Ennis, Joe Reichman, Louis Armstrong, Les Brown, Bernie Gummis, Al Donahue, Henry King, Harry Owens, and Tommy Tucker.

VI.

Defendant Music Corporation of America and said Wayne Dailard have heretofore entered into, and there is now in full force and effect, an agreement whereby said Wayne Dailard shall have the exclusive right to employ and use the artists and "name" bands represented by defendant Music Corporation of America within San Diego County, State of California; and defendants and each of them, and said Wayne Dailard, have unlawfully engaged in a combination and conspiracy in violation of the provisions of the Act of Congress passed July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and are engaged in such combination and conspiracy to place unlawful restraint upon the trade and commerce of musical entertainment between the several states and territories of the United States.

VII.

As an example of some of the acts and things done by defendants, and each of them, and said Wayne Dailard,

in carrying out said unlawful combination and conspiracy, plaintiffs allege that defendants, and each of them, and said Wayne Dailard, have done or caused to be done the following acts and things and adopted the courses of conduct hereinafter described:

A. In or about the month of November, 1944, plaintiffs were advised by the City of San Diego, they had been [23] awarded a lease upon said Mission Beach Amusement Park and Mission Beach Ballroom, for a period of three (3) years commencing January 3, 1945; plaintiffs immediately thereupon commenced negotiations with defendant Music Corporation of America and its officers, agents and employees, hereinabove referred to, for the purpose of obtaining the services of the "name" bands controlled by said defendants at said Mission Beach Ballroom, and defendant Music Corporation of America and its said officers, agents and employees agreed to supply to plaintiffs said "name" bands at prices currently being offered to other ballrooms. In reliance thereon, plaintiffs undertook the preparation of said Mission Beach Ballroom for a grand opening on the 3rd day of February, 1945, and continuously during the months of December, 1944, and January, 1945, requested of defendant and its said agents, servants and employees that they be advised of the identity of the "name" band who would be supplied for said grand opening. Said defendant and its said agents, servants and employees, consistently refused to furnish plaintiffs with the information requested or to offer to them any "name" band, or any band, or any musical entertainment for said purpose.

B. During the early part of the month of February, 1945, plaintiff Larry Finley personally, and through his attorneys, advised defendant Music Corporation of America that plaintiffs intended to commence an action against it under the Sherman Anti-Trust Act, and immediately thereafter and on or about the 23rd day of February, 1945, defendant Music Corporation of America and its agents, servants and employees, offered to book Jack Teagarden at plaintiffs' said ballroom at a price of [24] Twenty-two Hundred and Fifty Dollars (\$2,250), minimum guarantee against fifty per cent (50%) of the gross receipts to be taken in by said ballroom for a two-night engagement. Plaintiffs are informed and believe and therefore allege, that the price at which said defendants quoted Jack Teagarden and his orchestra to plaintiffs was substantially higher than the current price at other ballrooms of the size and character similar to that of plaintiffs for said "name" band.

C. From time to time during the months of January and February, 1945, plaintiff Larry Finley advised defendant Music Corporation of America and its said agents, servants and employees, of various "name" bands he desired to engage for performances at plaintiffs' said ballroom, and in each of said instances, the "name" band indicated by plaintiff to said defendants as desirable was subsequently booked into said ballroom operated by said Wayne Dailard.

D. On or about the 20th day of January, 1945, defendant Music Corporation of America and its agents, servants and employees, offered to book the

King Sisters, a vocal quartet, for plaintiffs' said ballroom, on February 10 and February 11, 1945, at a price of One Thousand Five Hundred Dollars (\$1,500) for both nights. Plaintiffs accepted said offer and daily thereafter requested of said defendants that the contracts for said booking be forwarded to them. Plaintiffs received no reply from said defendants, and on or about the 25th day of January, 1945, plaintiffs were advised by reading an advertisement in the San Diego newspapers, that said King Sisters were booked into said Pacific Square, the ballroom operated by said Wayne Dailard, for an engagement on the [25] 2nd to 4th days of February, 1945.

E. Plaintiffs are informed and believe, and upon such information and belief allege, that as to the few "name" bands not controlled by defendant Music Corporation of America, said defendant and its officers, agents, servants and employees have through means and methods unknown to plaintiffs exerted pressure and influence upon the personal representatives and employment agents for said few remaining "name" bands, compelling them to refrain from and refuse to offer said "name" bands for bookings at plaintiffs' said ballroom other than at prices very substantially higher than the current prices commanded by said "name" bands at other ballrooms of the size and character similar to that of plaintiffs.

F. Plaintiffs are informed and believe, and upon such information and belief allege, that defendant Music Corporation of America has and maintains exclusive contracts for various localities with many other ballrooms, one in each of such localities, similar to the arrangement between said defendant and said Wayne Dailard in the County of San Diego, California; and plaintiffs are further informed and believe, and upon such information and belief allege, that defendant Music Corporation of America, through means and methods unknown to plaintiffs, compels other personal representatives and employment agents to split fees with it upon bookings of clients of said other personal representatives and employment agents in said ballrooms with whom said defendant has exclusive agreements in said various localities.

G. On or about the 27th day of February, 1945, defendant Music Corporation of America and its said agents, servants and employees, offered to book Ted Fiorito and [26] his orchestra at plaintiffs' said ballroom, at and for a price of Two Thousand, Five Hundred Dollars (\$2,500), minimum guarantee against fifty per cent (50%) of the gross receipts for a two-night engagement. Plaintiffs are informed and believe, and upon such information and belief allege that said price so quoted is very substantially in excess of the price currently being asked for such

orchestra of other ballrooms of a size and character similar to that of plaintiffs.

VIII.

As a result of the combination and conspiracy hereinbefore alleged, and of the various acts done in pursuance thereof by defendants, and each of them, plaintiffs have been unable to obtain first-class musical entertainment and "name" bands for appearances and exhibitions at the said Mission Beach Ballroom at the said Mission Beach Amusement Park in the City of San Diego, California, and have been restricted in their trade and competition with other ballrooms in said City of San Diego; all of which was and is injurious to plaintiffs and excluded plaintiffs from competition in the trade, and because of such inability to compete by reason of the foregoing, plaintiffs have been damaged in that their business has been rendered unprofitable; and will continue to be rendered unprofitable during the remainder of the terms of their said lease: all to their damage in the sum of One Million Dollars (\$1,000,000); and plaintiffs are entitled under the laws of the United States, to wit, Section 7 of the Sherman Law above referred to, to recover three-fold their actual damages, to wit, the sum of Three Million Dollars (\$3,000,000).

IX.

Plaintiffs, in order to enforce their rights against the defendants, have employed the services of Messrs. Desser, Rau & [27] Christensen, a firm of attorneys in the City

of Los Angeles, State of California, the members of whom are all licensed and authorized to practice before the District Courts of the United States, and under the laws of the United States, to wit, Section 7 of the Sherman Act, plaintiffs are entitled to recover from defendants a reasonable attorneys' fees, and that reasonable attorneys' fees in this action is the sum of One Hundred Thousand Dollars (\$100,000).

X.

There is a diversity of citizenship of the parties in this action, and by reason thereof and by reason of the provisions of Chapter 648 of the United States of 1890 and the Acts amendatory thereto, this Court has jurisdiction of the parties hereto and the subject matter of this action.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, for the sum of One Million Dollars (\$1,000,000) as damages, and that said sum be trebled in accordance with the provisions of Section 7 of the Act of July 2, 1890, 26 Stat. 209; for reasonable attorneys' fees in the sum of One Hundred Thousand Dollars (\$100,000); and for costs of suit herein incurred.

DESSER, RAU & CHRISTENSEN

By Arthur A. Desser

Attorneys for Plaintiffs [28]

[Verified.]

[Endorsed]: Filed Feb. 6, 1946. [29]

DEFENDANTS' REQUESTED INSTRUCTION
NO. 44

The plaintiffs charge that defendant, Music Corporation, has monopolized trade and commerce in so-called "name" bands. You are instructed that in the eyes of the law and for purposes of applying the federal anti-trust laws, the expression "to monopolize trade and commerce" means "to control it, to exclude others from trade in commodities in such commerce and prevent them from dealing therein in a free market."

You are instructed that the evidence presented in this case is insufficient as a matter of law to establish that Music Corporation has monopolized trade and commerce in so-called "name" bands. Therefore, you shall not give any consideration, whatever, to plaintiffs' charge of monopoly, and on that issue, instruct you to find in favor of the defendants.

Montrose Lumber Co. v. United States, C. C. A.-
10, 124 F. 2d 573. [30]

DEFENDANTS' REQUESTED INSTRUCTION
NO. 43

Evidence has been presented to show that Music Corporation of America is one of the so-called "big four" booking agencies or personal service organizations which today represents band leaders throughout the country. You are instructed that such evidence in and of itself is not proof of any violation of the federal antitrust laws, for "the law does not make mere size an offense or the existence of unserted power an offense. . . .

It does not compel competition, nor require all that is possible."

United States v. United States Steel Corporation,
251 U. S. 417, 451.

United States v. International Harvester Com-
pany, 274 U. S. 694, 708.

[Endorsed]: Filed Feb. 14, 1946. [31]

[Title of District Court and Cause.]

INSTRUCTIONS TO JURY REQUESTED BY
DEFENDANTS

The defendants herein request the Court to deliver to the jury Defendants' Instructions Nos. 1 to submitted herewith.

FRANK P. DOHERTY
HAROLD F. COLLINS
PACHT, PELTON, WARNE, ROSS
AND BERNARD

By Clore Warne

Attorneys for Defendants [32]

DEFENDANTS' REQUESTED INSTRUCTION
NO. 35

You are instructed that agreements between Music Corporation of America and Wayne Dailard, which have been introduced in evidence as Defendants' Exhibit Nos. E and F, are lawful agreements which the parties thereto had a legal right to make and to perform.

Therefore, if you find that there were no other agreements and no combination or conspiracy between the defendants and Wayne Dailard, you must return a verdict in favor of the defendants unless you further find that the agreements in evidence were made or performed or used for the purpose and with the intent on the part of the defendants to unreasonably restrain interstate commerce in so-called "name" bands.

[Written]: Not given except as covered elsewhere. McCormick, J. [33]

DEFENDANTS' REQUESTED INSTRUCTION
No. 37

You are instructed that the labor of a human being is not a commodity of commerce.

Therefore, if you find that the activities on the part of Music Corporation of America and its defendant employees, of which plaintiff complains, consisted solely in the representation of band leaders for employment purposes, and if you further find that the defendants did not engage in such activities for the purpose of restraining interstate commerce in so-called "name" bands in an unreasonable manner, then you shall return a verdict in favor of the defendants.

15 U. S. C. 17.

Hunt v. Crumboch, 325 U. S. 821.

Allen Bradley Co. v. Local Union No. 3, I.B.F.W.,
325 U. S. 797.

[Written]: Not given except as covered. No application. McCormick, J. [34]

DEFENDANTS' REQUESTED INSTRUCTION
NO. 49

You are instructed that band leaders, as well as musicians generally, have legal rights in common with other artisans, workers and employees. These rights include the right to organize, to bargain collectively, to prescribe terms and conditions of employment, to fix prices for their personal services, to work or perform for whom they choose, and decline employment at any time or place they choose.

United States v. American Federation of Musicians, D. C. N. D. Ill., 47 F. Supp. 304; aff'd, per curiam.

[Written]: Not given. [Illegible.]

[Endorsed]: Filed Mar. 25, 1946. [35]

[Title of District Court and Cause.]

DEFENDANTS REQUEST FOR ADDITIONAL
INSTRUCTIONS

Defendants Music Corporation of America, H. E. Bishop and Lawrence Barnett request that the Court at this time give the following additional instructions to the jury. Such instructions are presented at this time in accordance with the long established practices in the federal courts as enunciated in the following authorities:

53 Am. Jur. 667, Sections 941, 942, citing United States and Federal Court cases including *Charlton v. Kelly* (C. C. A. 9th), 156 Fed. 433.

Allis v. United States, 155 U. S. 117, 39 L. Ed. 91. [36]

Spurr v. United States, 174 U. S. 728, 43 L. Ed. 1150.

Dated at Los Angeles, California, this 15th day of February, 1946.

FRANK P. DOHERTY
HAROLD F. COLLINS
PACHT, PELTON, WARNE, ROSS
AND BERNHARD

By Clore Warne

Attorneys for Defendants [37]

DEFENDANTS' REQUESTED ADDITIONAL
INSTRUCTION NO. A:

I have previously instructed you that the law placed upon the plaintiffs the burden of proving by a preponderance of the evidence certain essential facts, namely, the existence of a wrongful combination or conspiracy, the actual imposition of unreasonable restraints of interstate commerce in so-called name bands as a result of such combination or conspiracy, financial loss to the plaintiffs in the operation of Mission Beach Amusement Center which results directly from such unlawful combination or conspiracy and which is determinable without resort to guesswork, conjecture or speculation.

I now instruct you that this burden of proof which is upon plaintiffs requires that they prove by a preponderance of the evidence that all of these facts occurred. In other words, it is not enough that you find that an unlawful combination or conspiracy existed as charged in the com-

plaint and amended complaint, but you must also find that it was effective, so that if you merely find that there was a combination or conspiracy and that it was not the direct cause of any injury to the business or property of the plaintiffs, you must return a verdict in favor of the defendants. Also, if you find that the plaintiffs actually suffered a loss in their operation of the Mission Beach Amusement Center but that such loss was not the direct result of any wrongful conduct on the part of the defendants as charged in the complaint and amended complaint but was due to plaintiffs' method of operation or to economic conditions or to other factors not directly attributable to any wrongful act on the part of the defendants, then your verdict must be in favor of the defendants. [38]

DEFENDANTS' ADDITIONAL REQUESTED
INSTRUCTION O. C:

If the facts shown by the evidence tend to sustain the inference that the defendants, together with Wayne Dailard, have engaged in a wrongful combination or conspiracy to unlawfully restrain interstate commerce, and also tend equally to sustain the inference that said persons did not so engage, then I instruct you that plaintiffs' claim of wrongful conspiracy has not been established and your verdict must be in favor of the defendants.

Likewise, in any consideration of the subject of damages, if you find that the evidence tends equally to establish two contradictory inferences, one that plaintiffs have suffered loss as a result of an unlawful combination or conspiracy on the part of the defendants and Wayne Dailard as charged, and the other that such loss, if any,

was attributable to other causes and factors and was not directly and proximately caused by wrongful acts of defendants and Wayne Dailard, then you must return a verdict in favor of the defendants.

Schad v. Twentieth Century-Fox Film Corporation, CCA-3, 1943, 136 F. (2d) 991, 996. [39]

DEFENDANTS' ADDITIONAL REQUESTED
INSTRUCTION NO. D:

In order for you to find the loss, if any, suffered by the plaintiffs in the operation of Mission Beach Amusement Center is recoverable as damages against the defendants or any of them in this case, you must first find that such loss resulted directly and proximately from the alleged wrongful combination and conspiracy between said defendants and Wayne Dailard. Any loss suffered or caused by reason of other factors are not recoverable.

In this connection, you may consider all of the facts proven upon the trial, including plaintiffs' manner and policy of operation of their said business, and the change, if any, of economic and business conditions. [40]

DEFENDANTS' ADDITIONAL REQUESTED
INSTRUCTION NO. F:

I am giving you certain additional instructions. They are to be considered by you not separate and apart and not as stating any different law than I have otherwise given to you. These instructions are intended only to amplify the other instructions given to you upon the law which is to govern and control as applied by you to the facts proven upon the trial.

[Endorsed]: Filed Feb. 15, 1946. [41]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above entitled cause, find in favor of the plaintiffs, Larry Finley and Miriam Finley, and against the defendants, Music Corporation of America, a Delaware corporation, H. E. Bishop and Lawrence R. Barnett, and assess the damages in the sum of \$55,500.00 *Dollars*.

Dated: Los Angeles, California, February 15, 1946.

A. W. HUDSON

Foreman of the Jury

[Endorsed]: Filed Feb. 15, 1946. [42]

[Title of District Court and Cause.]

APPLICATION FOR ATTORNEYS' FEES, ATTORNEYS FOR THE PLAINTIFFS

To the Honorable Paul J. McCormick, Judge of the District Court:

The petition of Messrs. Desser, Rau and Christensen respectfully shows and alleges:

I.

That they are the attorneys for the plaintiffs herein and were retained in January, 1945, by plaintiffs with reference to plaintiffs' attempts to obtain band bookings for plaintiffs' ballroom at Mission Beach Amusement Park, San Diego, California. During the month of February, 1945, plaintiffs' situation with respect to the obtaining of name bands became desperate, inasmuch as

Music Corporation of America and its officers and agents, having theretofore promised to supply bands to plaintiffs, refused to do so, and Arthur A. Desser, senior member of Desser, Rau and Christensen, engaged in many conversations and consultations with [43] Mr. Joseph Ross, counsel of Music Corporation of America, relative to the matter. Said conferences and conversations resulted in naught, and it became increasingly apparent that it would be necessary for plaintiffs to commence an action under the Sherman Anti-Trust Act to protect their rights.

II.

Accordingly, during the early part of the month of March, 1945, Messrs. Jack L. Rau and William Christensen, members of the firm of Desser, Rau and Christensen, conducted exhaustive and extensive research into the law governing the situation and discussing the matter with Mr. Finley; and at the conclusion of their discussions and research, prepared the original complaint herein, which was filed on March 20, 1945.

III.

Thereafter, during April, May and June, Mr. Desser had numerous additional conferences with Mr. Ross, and Mr. Rau and Mr. Christensen conferred frequently with Mr. Finley and witnesses.

IV.

The defendants filed a motion to dismiss, a motion to strike and a motion for a more definite statement of claim,

which was set for hearing on June 21, 1945. During the month of June, Mr. Rau and Mr. Christensen analyzed said motions, conducted further research and prepared a memorandum of points and authorities in opposition thereto, and had additional conferences with Mr. Finley. On June 21, Mr. Christensen was required to appear before Your Honor in opposition to said motions and successfully opposed the same.

V.

Thereafter counsel prepared affidavits and notices for the taking of depositions of various parties to the action and prepared for the taking of said depositions during the months of July and August; and on August 8th, 9th and 10th, Mr. Rau took the [44] depositions of Messrs. Stein, Bishop and Barnett, and on August 27th and 29th took the depositions of Harold Howard and Wayne Dailard, the deposition of Mr. Dailard being taken at San Diego, California, and necessitating a trip to that City for that purpose by Mr. Rau.

VI.

During the month of September, defendants filed certain written interrogatories requiring written answers thereto by plaintiff, Larry Finley, and during that month, Messrs. Desser, Rau and Christensen conferred frequently with Mr. Finley and devoted a substantial amount of time to the preparation of the answers to said interrogatories. During the same month, Mr. Rau appeared before Your Honor at the pre-trial hearing of this case.

VII.

During the month of October, 1945, further conferences were held with Mr. Finley, and on October 8th and 9th, Mr. Finley's deposition was taken in the office of Messrs. Pacht, Pelton, Warne, Ross and Bernhard. During the same month, Mr. Rau prepared documents to take the deposition of Mr. Kenneth Later at New York City, and in November, Mr. Later's deposition was taken at New York by Mr. Desser and Mr. Armand Lackenbach of New York City, who was associated for that purpose.

VIII.

During the latter part of November, defendants served upon plaintiff a very lengthy and involved motion for summary judgment and accompanied the same with an extensive brief in support thereof. During the first week of December, Mr. Christensen and Mr. F. Filmore Jaffe, an attorney employed in the office of Desser, Rau and Christensen, devoted a great deal of time to the preparation of the affidavit filed in opposition to said motion and the points and authorities filed in opposition thereto; and on December 7th, Mr. Christensen, Mr. Jaffe and Mr. Louis M. Karp, [45] another attorney employed in petitioners' offices, appeared before Your Honor to argue in opposition to said motion.

IX.

During the remainder of December and during January, 1946, Messrs. Christensen, Jaffe and Karp had

numerous conferences, both in Los Angeles and San Diego, preparatory to the trial of the action.

X.

Between November 15, 1945, and January 25, 1946, Mr. Jaffe devoted 45 days to the analysis of the case and the pleadings, facts, the law and the preparation of plaintiffs' trial brief.

XI.

The trial of the action commenced on January 29, 1946, and continued thereafter for 13 Court days, during each of which Messrs. Christensen, Jaffe and Karp attended the daily sessions of the Court and participated in the trial.

XII.

At the conclusion of each day of the trial, Messrs. Christensen, Jaffe and Karp, and on some occasions Desser and Rau, participated in conferences with Mr. Finley and other witnesses, each of said conferences lasting at least 2 hours and on some occasions 3 hours.

XIII.

On February 12, 1946, Messrs. Christensen and Jaffe prepared their arguments to the jury.

XIV.

Attached hereto, identified as Exhibit "A", and by this reference incorporated herein the same as though here fully set forth, is the schedule of the actual time ex-

pended by counsel for the plaintiffs, and their various attorney employees, in the performance of the legal services hereinbefore described. Said schedule has been prepared in such a manner so that the time [46] devoted by the members of the firm is referred to as the Seniors' time, and the time devoted by employees of the firm is referred to as Juniors' time. A day is computed on the basis of 7 hours; and where portions of the day were spent and the time computed in hours, the total of such hours has been computed in days; and as will appear from said Exhibit "A", the total Senior time thus spent is $51\frac{3}{4}$ days and the total Junior time thus spent is $90\frac{1}{2}$ days.

Petitioners' fees, while to some extent flexible, are ordinarily predicated upon the basis of \$200.00 per diem for Seniors' time, and \$100.00 per diem for Juniors' time. Applying this schedule to the total of days devoted to the above entitled action, the value of petitioners' services is \$19,400.00, and petitioners allege said sum to be the fair and reasonable value of said services so rendered.

Wherefore, petitioners pray that an order be made and entered herein allowing to plaintifffs the sum of \$19,400.00 as attorneys' fees, said sum to be added to and included in the judgment to be entered herein.

DESSER, RAU & CHRISTENSEN

By William Christensen

Petitioners [47]

EXHIBIT "A"

<u>Date</u>		<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>	
				<u>Seniors Days</u>	<u>Juniors Days Hrs.</u>
<u>1945</u>					
Feb.	2	Telephone conference with Joseph Ross	Desser		1/4
Feb.	5	Telephone conference with Joseph Ross	Desser		1/4
Feb.	13	Telephone conference with Joseph Ross	Desser		1/4
Feb.	14	Telephone conference with Joseph Ross	Desser		1/4
Feb.	14	Telephone conference with Joseph Ross	Desser		1/4
Feb.	14	Conference with Joseph Ross	Desser		1/2
Feb.	23	Telephone conference with Joseph Ross	Desser		1/4
Mar.	13	Research in prepara- tion of complaint	Rau Christensen	5	
Mar.	19	Correlation of Evi- dence re Complaint	Christensen	1	

(Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>	
			<u>Seniors Days</u>	<u>Junior Days</u>
Mar. 20	Drafting & filing of Complaint	Rau	$\frac{1}{2}$	
Apr. 9	Telephone conference with Joseph Ross	Desser		$\frac{1}{4}$
Apr. 10	Telephone conference with Joseph Ross	Desser		$\frac{1}{4}$
Apr. 17	Telephone conference with Joseph Ross	Desser		$\frac{1}{4}$
Apr. 23	Telephone conference with Joseph Ross	Desser		$\frac{1}{4}$
May 1	Telephone conference with Joseph Ross	Desser		$\frac{1}{4}$
May 21	Conference with Larry Finley	Rau	1	
May 23	Conference with witnesses	Rau	2	
May 24	Conference with Larry Finley	Rau	1	
Carried Fwd.			$6\frac{1}{2}$	$7\frac{1}{4}$

Exhibit "A")

Date	Subject	Services Rendered By	Time	
			Seniors Days	Juniors Days Hrs.
	Brought Fwd.		6½	7¼
ay 25	Conference with Larry Finley & witnesses	Christensen		2½
ay 26	Conference with witnesses	Christensen		2
ay 28	Conference with witnesses	Rau		2
ay 29	Conference with Larry Finley	Rau		2
ne 5	Conference with Larry Finley & witnesses	Christensen		5
		Rau		5
ne 5	Analysis & research for memorandum and points and authorities in opposition to mo- tion to dismiss, mo- tion to strike, and motion for more defi- nite statement of claim	Christensen	1½	
		Rau	1½	

(Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>	
			<u>Seniors Days</u>	<u>Juni Hrs. Days</u>
June 6	Conference with Larry Finley	Christensen	2	
June 21	Appearance re motion to dismiss, motion to strike and motion for more definite statement of claim	Christensen	½	
June 22	Preparataion of No- tice of Ruling	Rau	1	
July 10	Notice of Taking Deposition	Rau	1	
July 19	Affidavit for Sub- poena Duces Tecum	Rau	1	
July 19	Affidavit for Sub- poena re Deposition	Rau	1	
August 6	Preparation for Taking Deposition	Rau	½	
August 7	Preparation for Taking Deposition	Rau	½	
Carried Fwd.			11	31¾

Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>			
			<u>Seniors</u>		<u>Juniors</u>	
			<u>Days</u>	<u>Hrs.</u>	<u>Days</u>	<u>Hrs.</u>
	Brought Fwd.		11	31¾		
Aug. 8	Jules C. Stein Deposition	Rau	1			
Aug. 9	Harold Eames Bishop Deposition	Rau	¾			
Aug. 9	Lawrence R. Barnett Deposition	Rau		3		
Aug. 10	Lawrence R. Barnett Deposition	Rau	½			
Aug. 13	Conference with Larry Finley	Desser		2		
Aug. 27	Harold Howard Deposition	Rau		2		
Aug. 29	Wayne Dailard Deposition	Rau	1			
Sept. 20	Preparation and drafting objections to interrogatories; notice of motion to sustain objections	Rau		6		

(Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>	
			<u>Seniors Days</u>	<u>Junior Hrs. Days</u>
	to interrogatories; Memorandum of Points and Authori- ties in Support of Motion to interroga- tories; Motion to sustain objections to interrogatories			
Sept. 26	Conference with Larry Finley	Desser Rau Christensen	$\frac{1}{2}$ $\frac{1}{2}$ $\frac{1}{2}$	
Sept. 27	Conference with Larry Finley	Desser Rau Christensen	$\frac{1}{2}$ $\frac{1}{2}$ $\frac{1}{2}$	
Sept. 28	Appearance re Pre-trial hearing	Rau	$\frac{1}{2}$	
Sept. 29	Conference with Larry Finley	Desser Rau Christensen	$\frac{1}{2}$ $\frac{1}{2}$ $\frac{1}{2}$	
Oct. 1	Conference with Larry Finley	Rau		1
Carried Fwd.			<hr/> 19 $\frac{1}{4}$	<hr/> 45 $\frac{3}{4}$

Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>	
			<u>Seniors Days</u>	<u>Juniors Hrs. Days Hrs.</u>
	Brought Fwd.		19¼	45¾
8	Larry Finley Deposition	Rau	2	
17	Preparation & drafting notice of taking deposition; notice of motion for order directing the issuance of commission to take deposition; affidavit in support of motion for order directing the issuance of commission to take deposition; motion for issuance of commission to take deposition	Rau	½	
21	Kenneth Later Deposition	Desser Lackenbach	1 1	
5	Preparation and drafting affidavit in opposition to	Christensen	2	

(Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>		<u>Junior Days</u>
			<u>Seniors Days</u>	<u>Hrs.</u>	
	defendant's motion for summary judgment				
Dec. 5	Research and preparation of points and authorities in support of plaintiff's affidavit in opposition to defendants' motion for summary judgment	Jaffe			6
Dec. 7	Appearance re Motion for summary judgment	Christensen Jaffe Karp	2		
Dec. 19	Conference with witnesses	Christensen	2		
Dec. 21	Appearance re Change of Venue	Christensen Jaffee Karp	1		
Dec. 24	Conference with witnesses	Karp			
Carried Fwd.			23¾	52¾	6

Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>			
			<u>Seniors</u>		<u>Juniors</u>	
			<u>Days</u>	<u>Hrs.</u>	<u>Days</u>	<u>Hrs.</u>
946	Brought Fwd.		23	3/4	52	3/4
					6	10
a. 7	Conference with witnesses	Jaffe				2
a. 10	Conference with witnesses	Karp				2
a. 16	Interview with witnesses in San Diego	Christensen	2			
& 17		Jaffe			2	
a. 23	Conference with witnesses	Jaffe				3
		Karp				3
Nov. 15						
to)						
a. 25	Plaintiff's Trial Brief	Jaffe			45	
a. 29	Appearance re Trial	Christensen	13			
to		Jaffe			13	
b. 15		Karp			13	
a. 29	Conference with Larry Finley and witnesses	Christensen		2		
		Jaffe				2
		Karp				2
		Desser		2		

(Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>		<u>Junior Days H</u>
			<u>Seniors Days</u>	<u>Hrs.</u>	
Jan. 30	Conference with Larry Finley and witnesses	Christensen Jaffe Rau Karp		2 2	
Jan. 31	Conference with Larry Finley and witnesses	Christensen Jaffe Desser Rau Karp		2 1 1	
Feb. 1	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2	
Feb. 2	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		3	
Feb. 4	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2	
Carried Fwd.			38¾	71¾	79

Exhibit "A")

Date	Subject	Services Rendered By	Time			
			Seniors		Juniors	
			Days	Hrs.	Days	Hrs.
	Brought Fwd.		38	¾	71	¾
b. 5	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2		2 2
b. 6	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2		2 2
b. 7	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2		2 2
b. 8	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2		2 2
b. 10	Conference with Larry Finley and witnesses	Christensen Desser Jaffe Karp		2 1		2 2
b. 11	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2		2 2
b. 12	Conference with Larry Finley and witnesses	Christensen Jaffe Karp		2		2 2

(Exhibit "A")

<u>Date</u>	<u>Subject</u>	<u>Services Rendered By</u>	<u>Time</u>	
			<u>Seniors Days</u>	<u>Juniors Days Hrs.</u>
Feb. 13	Conference with Larry Finley and witnesses	Christensen Jaffe Karp	2	
Feb. 12	Preparation of Arguments	Christensen Jaffe	3	
Total			38¾	91¾ 79 8

RECAPITULATION

Seniors' Time	38¾ days	
plus 91¾ hrs =	13 days	
Total	51¾ days @ \$200.00—	\$10,350.00
Juniors' Time	79 days	
plus 82 hours =	11½ days	
	90½ days @ \$100.00—	\$ 9,050.00
		\$19,400.00

[53]

[Verified.]

Received copy of the within application this 21 day of February 1946. Pacht, Pelton, Warne, Ross & Bernhard, June Smolen, Attorneys for Defendants.

[Endorsed]: Filed Feb. 25, 1946. [54]

[Minutes: Thursday, March 21, 1946]

Present: The Honorable Paul J. McCormick, District Judge.

This cause coming on for hearing on (1) objections to application for attorneys' fees for plaintiffs, solely as to specification 4, on lines 9 to 13, inclusive, of page 2 of defendants' specification of objection; and (2) motion of defendant Music Corporation of America to strike from the files plaintiffs' petition for inclusion of Mandatory Injunction in Judgment to be entered; Wm. Christensen, Esq., appearing for the plaintiffs; Clore Warne, Esq., appearing for the defendants; both sides answer ready and it is ordered that counsel proceed.

Attorney Christensen argues in support of plaintiffs' petition for inclusion of Mandatory Injunction in Judgment. Attorney Warne argues in opposition. Attorney Christensen makes reply statement.

It is ordered that the objections of defendants to the petition for inclusion of mandatory injunction in the judgment to be entered be sustained, and ordered that said petition be denied without prejudice.

At 10:45 A. M. Attorney Warne argues re objections to application for attorneys' fees for plaintiffs. Attorney Christensen makes reply statement.

It is ordered that a fee of \$7500.00 be allowed plaintiffs at this time, to be included in the judgment, counsel for plaintiffs to prepare judgment. [55]

In the District Court of the United States for the
Southern District of California

Central Division

No. 4328-M-Civil

LARRY FINLEY and MIRIAM FINLEY,

Plaintiffs,

vs.

MUSIC CORPORATION OF AMERICA, a Delaware corporation; H. E. BISHOP; LAWRENCE BARNETT; etc., et al.,

Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on February 1, 1946, in the above entitled court before the Honorable Paul J. McCormick, judge presiding, Messrs. Desser, Rau and Christensen, by Wm. Christensen, F. Filmore Jaffe, and Louis M. Karp, appearing as attorneys for plaintiffs, and Messrs. Pacht, Pelton, Warne, Ross and Bernhard, by Clore Warne, and Frank P. Dougherty and Harold P. Collins appearing as attorneys for defendants, and a trial by jury having been duly had, and the jury having rendered a verdict in favor of the plaintiffs and against the defendants, Music Corporation of America, a Delaware corporation, H. E. Bishop and Lawrence Barnett, for Fifty-Five Thousand, Five Hundred (\$55,500.00) Dollars; thereafter and on March 21,

1946, plaintiffs' petition for the allowance of a reasonable attorneys' fees for the [56] institution and prosecution of the above entitled cause against said defendants and the court, having determined that the sum of Seven Thousand, Five Hundred (\$7,500.00) Dollars is a reasonable sum to be allowed plaintiffs as and for such attorneys' fees,

It Is Ordered, Adjudged and Decreed that plaintiffs do have and recover from defendants Music Corporation of America, a Delaware corporation, H. E. Bishop and Lawrence Barnett, the sum of Fifty-Five Thousand, Five Hundred (\$55,500.00) Dollars and the further sum of Seven Thousand, Five Hundred (\$7,500.00) Dollars attorneys' fees in this cause, together with costs taxed at (\$1592.85) Dollars.

Dated: April 9th, 1946.

PAUL J. McCORMICK

Judge

Disapproved [CW]

~~Approved~~ as to form this 3rd day of April, 1946. Pacht, Pelton, Warne, Ross and Bernhard; Frank P. Dougherty and Harold F. Collins, by Clore Warne, Attorneys for Defendants.

Judgment entered Apr. 9, 1946. Docketed Apr. 9, 1946. C. O. Book 37, page 658. Edmund L. Smith, Clerk; by R. B. Clifton, Deputy.

[Endorsed]: Filed Apr. 9, 1946. [57]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

DISBURSEMENTS

1945

Mar. 20	Filing Fee, Complaint	\$ 15.00
July 21	Service of Subpoena, Jules C. Stein H. E. Bishop Lawrence Barnett	5.00
Aug. 3	Service of Subpoena Duces Tecum Jules C. Stein	8.00
Aug. 14	Service of Subpoena, Wayne Dailard	2.50
Aug. 17	Service of Subpoena, Harold Howard	3.50
Aug. 29	Deposition of Wayne Dailard	30.25
Oct. 1	Pre-Trial Transcript	14.70
Oct. 26	Depositions: H. Eames Bishop Lawrence Barnett Jules C. Stein Harold Howard Larry Finley	383.65
		[58]

1945

Nov. 28	Notary fee re Deposition of Ken Later	\$ 15.00
Nov. 28	Deposition of Kenneth Later	45.75

1946

Feb.	5	Daily Transcript, Week ending Feb. 1, 1946	387.80
Feb.	11	Daily Transcript, Week ending Feb. 8, 1946	457.80
Feb.	13	Jury Meals	30.00
Feb.	20	Service of Subpoena: H. Eames Bishop Lawrence Barnett Jules C. Stein Harold Howard Tom Hamlon Ralph Wonders Dick Webster Billy McDonald Larry Shea Bernie Cohen Harold Jovien Al Jarvis Carlos Gastel Isabel Katelman Charles Wick	60.00
		Notary Fees	3.50
Feb.	15	Daily Transcript, Week ending Feb. 15, 1946	155.40
Apr.	9	Attorneys' Docket Fees (Sec. 824 R.S.) (Sec. 571-2 Title 28 U.S.C.	20.00
Total			<hr/> \$1,592.85

[Written]: Taxed pms stip

[Verified.] [59]

To Pacht, Pelton, Warne, Ross & Bernhard

Union Bank Building, Los Angeles, California

You will please take notice that on Friday, the 12th day of April, 1946, at the hour of 10:00 o'clock a. m., plaintiffs will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

DESSER, RAU CHRISTENSEN

By F. Filmore Jaffe

Attorneys for Plaintiffs [60]

Received copy of the within Memorandum of Costs and Disbursements this 10th day of April, 1946. Pacht, Pelton, Warne, Ross Bernhard, June Smolen, Attorneys for Defendants.

[Endorsed]: Filed Apr. 11, 1946. [61]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between counsel for plaintiffs and defendants as follows:

1) That there may be taxed as costs in favor of plaintiffs on the judgment now of record, in addition to the other items mentioned in the costs bill, those specific items to which objections have been raised by defendants, to wit:

"Feb. 5	Daily Transcript, Week ending Feb. 1, 1946	\$387.80"
"Feb. 11	Daily Transcript, Week ending Feb. 8, 1946	457.80"
"Feb. 15	Daily Transcript, Week ending Feb. 15, 1946	155.40"

2) That plaintiffs acknowledge receipt of a copy of said Daily Transcript and that on any appeal in said action, said copy of the transcript so received by plaintiffs shall be deemed to be a [62] copy available for the use of plaintiffs on the appeal, and that it will be sufficient for appellant to file only one copy of the Reporter's Transcript with the Clerk in order to constitute compliance with Rule 75, Federal Rules of Civil Procedure.

3) That the provisions of this stipulation allowing said costs to be taxed in favor of plaintiffs shall obtain and be reciprocal and shall constitute authority for the taxing of like items as costs in the event of any ultimate judgment in favor of defendants.

Dated: April 15, 1946.

DESSER, RAU & CHRISTENSEN

By F. Filmore Jaffe

Attorneys for Plaintiffs

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

Attorneys for Said Defendants

[Endorsed]: Filed Apr. 16, 1946. [63]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS MUSIC CORPORATION OF AMERICA, H. E. BISHOP AND LAWRENCE BARNETT FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants Music Corporation of America, H. E. Bishop and Lawrence Barnett, and each of them, move said court for an order vacating the verdict of the jury heretofore rendered and the judgment entered thereon, and each of them, and to set aside said verdict and judgment in accordance with their motion heretofore made for a directed verdict.

Said motion is made upon the grounds asserted, urged and set forth in said defendants' motion for a directed verdict made at the close of all of the evidence, including the grounds set forth in their motion filed and made at the close of plaintiffs' evidence and upon each and all of the grounds stated in said motion.

Said motion is made and based upon the pleadings, record and files in said cause, the verdict and judgment entered [64] therein and upon the reporter's stenographic transcript of evidence and the exhibits filed in said cause, and upon a brief and points and authorities to be hereafter filed.

This motion is made and presented to the court joined with a motion for a new trial prayed for in the alternative, and defendants pray that in the event this motion for a directed verdict be denied, the court then consider and grant defendants' motion for a new trial.

Dated: this 17th day of April, 1946.

FRANK P. DOHERTY

HAROLD F. COLLINS

PACHT, PELTON, WARNE, ROSS

& BERNHARD

By Clore Warne

Attorneys for Said Defendants [65]

Received copy of the within Motion for Judgment Notwithstanding, etc., this 18 day of April, 1946. Desser, Rau & Christensen, Attorneys for Plaintiffs.

[Endorsed]: Filed Apr. 18, 1946. [66]

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR NEW TRIAL

Defendants, Music Corporation of America, H. E. Bishop and Lawrence Barnett, and each of them, move said Court for an order vacating the verdict of the jury and the judgment entered thereon, and move for a new trial of said action.

This motion for new trial is joined with said defendants' motion for judgment notwithstanding the verdict, and which said motion defendants pray be first considered and ruled upon, and in the event it is denied that the Court then consider and grant this motion for a new trial.

Said motion is made upon the following grounds:

- 1) Irregularity in the proceedings of the Court, jury and adverse party and abuse of discretion of

the said Court by which said defendants were prevented from having a fair trial; [67]

- 2) Misconduct of the jury;
- 3) Excessive damages appearing to have been given under the influence of passion or prejudice;
- 4) Insufficiency of the evidence to justify the verdict of the jury;
- 5) Error in law occurring at the trial.

Said motion will be made and based upon the records, pleadings and files of said cause and upon the minutes of the Court, including the Reporter's Transcript and the exhibits in said cause, and upon the brief and points and authorities hereafter to be filed.

Defendants specify as error in law occurring at the trial the following:

Specification of Error No. 1: Error in sustaining plaintiffs' objection to certain questions propounded upon the cross-examination by defendants of plaintiffs' witness Lawrence Mirken (which said questions and the ruling of the Court thereon appear at pages 1345 and 1346 of the Reporter's Transcript).

Specification of Error No. 2: Improper admission of testimony concerning alleged immoral and other conditions at Mission Beach Amusement Park when it was under the operation of Wayne Dailard prior to the period of the alleged conspiracy, this consisting of the testimony of plaintiffs' witnesses, Knox, Austin, Crary, Calland, Weston, and certain portions of the testimony of plaintiff Larry Finley, all of which testimony was admitted over the objection of defendants.

Specification of Error No. 3: Error in admitting into evidence a document denominated "Plaintiffs' Bid", plaintiffs' Exhibit 8, together with accompanying letters of commendation of plaintiff Larry Finley, all over the objection of defendants.

Specification of Error No. 4: Error in admitting into evidence over objection of defendants the testimony and evidence of earnings and of losses of plaintiffs occurring after March 20, 1945, [68] the date of the commencement of said action.

Specification of Error No. 5: Error in admitting into evidence over the objection of defendants of testimony of Wayne Dailard and evidence concerning the profits accruing to him and his partner Wakelin in the operation of Mission Beach Amusement Park and Ballroom prior to January 1, 1945.

Specification of Error No. 6: Error of the Court in refusing to grant defendants' motion to strike said evidence last mentioned.

Specification of Error No. 7: Error in admitting into evidence over the objection of defendants testimony of Wayne Dailard and evidence of and concerning the profits made by said Wayne Dailard in the operation of Pacific Square Ballroom for the years 1944 and in part the year 1945.

Specification of Error No. 8: Denial of defendants' motion to strike said evidence last mentioned.

Specification of Error No. 9: Error of the Court in instructing the jury, in giving certain instructions requested by plaintiffs and in refusing to give certain instructions requested by defendants, all duly over the objec-

tions of defendants, with exceptions saved. The specific instructions, as to which error is urged, are set forth under designations as follows:

a) There is denominated "Instruction Errors 1 to 7" and which consist of error in the giving of certain instructions requested by plaintiffs as follows:

No. 1: Plaintiffs' requested instruction No. 23.

No. 2: Plaintiffs' requested instruction No. 24.

No. 3: Plaintiffs' requested instruction No. 1.

No. 4: Plaintiffs' requested instruction No. 2.

No. 5: Plaintiffs' requested instruction No. 29.

No. 6: Plaintiffs' requested instruction No. 28.

No. 7: Plaintiffs' requested instruction No. 18. [69] (all of which appear in the Reporter's Transcript, page 1403, line 21, to and including page 1404, line 13).

b) Error in refusing to give defendants' requested instruction No. 44.

This is denominated "Instruction Error No. 8."

c) Error in giving its own instruction, being a modification of a defendants' requested instruction, as the same appears in Reporter's Transcript, page 1410, lines 2 to 9.

This is denominated "Instruction Error No. 9."

d) Error in giving defendants' requested instruction No. 5 as it appears in Reporter's Transcript, page 1410, line 10 et seq.

This is denominated "Instruction Error No. 10."

e) Error in instructing the jury by giving plaintiffs' requested instruction No. 15 as it appears in Reporter's Transcript, page 1411, line 23.

This is denominated "Instruction Error No. 11."

Defendants specify the particulars wherein the evidence is insufficient to support the verdict of the jury as follows:

I. The evidence does not support and/or sustain the implied and necessary finding that the defendants, or any of them, restrained interstate commerce within the meaning of the anti-trust laws of the United States, either as alleged in the plaintiffs' amended complaint or otherwise.

II. The evidence does not support and/or sustain the implied and necessary finding that there was any trade or commerce, within the meaning of the anti-trust laws of the United States which was the object or subject of any restraint on the part of defendants or any of them, either as alleged in the amended complaint or otherwise. [70]

III. The evidence does not support and/or sustain the implied and necessary finding that defendants monopolized, or tended or attempted to monopolize the business of musical entertainment, and/or the business of the playing of "name" bands in violation of or within the meaning of the anti-trust laws of the United States, either as alleged in plaintiffs' amended complaint or otherwise.

IV. The evidence does not support and/or sustain the implied and necessary finding that the defendants, Music Corporation of America, H. E. Bishop and Lawrence Barnett, contracted, conspired or combined to re-

strain interstate commerce within the meaning of the anti-trust laws of the United States, either as alleged in plaintiffs' amended complaint or otherwise.

V. The evidence does not support and/or sustain the implied and necessary finding of any unreasonable restraint of interstate commerce within the meaning of the anti-trust laws of the United States, either as alleged in plaintiffs' amended complaint or otherwise.

VI. The evidence does not support and/or sustain the implied and necessary finding that any damages, or damages in the sum of \$18,500, or in any other sum or amount, were suffered or sustained by plaintiffs as a result of any restraint of interstate commerce within the meaning of the anti-trust laws of the United States, or by reason of any acts or conduct on behalf of said defendants, or any of them, either as alleged in plaintiffs' amended complaint or otherwise.

Dated: April 17th, 1946.

FRANK P. DOHERTY

HAROLD F. COLLINS

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

Attorneys for Said Defendants [71]

Received Copy of the within Motion for New Trial this 18 day of April, 1946. Dessler, Rau & Christensen, Attorneys for Plaintiffs.

[Endorsed]: Filed Apr. 18, 1946. [72]

[Title of District Court and Cause.]

PARTIAL RULING ON DEFENDANTS' MOTIONS
FOR JUDGMENT, NOTWITHSTANDING THE
VERDICT OF THE JURY, AND FOR NEW
TRIAL

A review of the record and a study of the briefs on the defendants' motion for judgment, notwithstanding the verdict of the jury, and for new trial, have shown no cause to disturb the findings and verdict of the jury or the judgment herein except possibly upon Point 3, page 97, line 7, to page 110 of defendants' printed brief filed herein April 24, 1946.

As to such sole question of the jury's estimate and assessment of the pecuniary damages to plaintiffs, the court will on Tuesday, June 11, 1946, at 10:00 A. M., hear such further restricted oral argument as respective counsel may present. Two hours being allowed. One hour on each side. Plaintiffs to open and close.

See *Keogh v. C&W Ry. Co.*, 260 U. S. 156; *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 at 453. Cf. *Bigelow v. R.K.O. Radio Pictures*, 90 L. Ed. (Adv. Sh.) 579. (Feb. 25, 1946.)

Dated June 4, 1946.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Jun. 4, 1946. [73]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS ON DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY AND FOR NEW TRIAL

McCormick, District Judge.

Plaintiffs sue under Section 15, Title 15, United States Code, for damages, alleging injury to their business and property by reason of interstate activities of defendants violative of Sections 1 and 2 of the Antitrust Laws of the United States. Sections 1 and 2, Title 15, U. S. C. A.

The specific charges relate to a contract and combination between defendants and one Wayne Dailard to restrain and to monopolize interstate trade and commerce in the public entertainment field wherein so-called "name bands" are engaged and utilized in commercial ball rooms and dance halls.

The cause was tried to a jury. At the conclusion of an approximate ten days' trial a general verdict was rendered for the plaintiffs and against the defendants named above, wherein treble damages were awarded to the plaintiffs in the sum of \$55,500.00. Subsequently, and pursuant to Section 15, *supra*, the court, after a hearing, allowed costs of suit, including a reasonable attorney's fee, in the aggregate sum of \$9092.85. Thereafter judgment was accordingly entered and docketed.

Defendants, pursuant to Rule 50, F. R. C. P., have [74] filed and presented their motions for judgment in their favor notwithstanding the verdict of the jury, or, in the alternative, for a new trial. The court after considering

the briefs of the respective parties entered herein a partial ruling wherein the court found that no cause had been shown which warranted or justified any disturbance of the findings and verdict of the jury save the possibility that under the rules enunciated by the Supreme Court in *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, (1922), and reiterated in *Georgia v. Pennsylvania R. Co.*, 324 U. S. at page 453, and earlier established in *Central Coal & Coke Co. et al. v. Hartman*, (C. C. A. 8, 1901), 111 F. 96, the jury's fixation of the damages for the injury to the plaintiffs by reason of defendants' wrongdoing does not conform to the yardstick of certainty required by the decisions of the courts of the United States.

Counsel for the parties have presented further arguments upon the reserved question. We are constrained by the weight of prevailing authority to conclude that even under the liberalized application by the Supreme Court of the rules pertaining to damages per se in actions relating to activities forbidden by the Antitrust laws, such as those found by the jury in this action, the evidence in the record before us falls short of the legally required certainty. Cf. *Bigelow v. RKO Radio Pictures*, 90 L. Ed., (Adv.' Sheet 579, February 25, 1946).

The record indicates that probably the jury's "expression in figures" of the treble damages at \$55,500.00 is based upon evidence that in the year 1944 Wayne Dailard, the predecessor of the plaintiffs in the conduct and operation of the Mission Beach Amusement Center and ballroom, as stated in defendants' brief on the motions before us, showed [75] a profit therefrom of approximately \$74,000.00, and that 25% thereof was allocable to the ballroom. Such a deduction, however, is conjectural and

based upon too insecure support under the record to sufficiently fix the damages to the plaintiffs so as to bring the award of the jury under the standard established by the decisions.

Having reviewed all of the evidence before the court on the issue of monetary damages, exclusive of other factors of injury to the plaintiffs, we believe it to be legally inadequate to support the jury's estimate of \$18,500.00 actual damages. In reaching this conclusion we are not unmindful that there is a clear distinction between the rules prescribing pecuniary relief to "one injured in his business or property" according to the terms of Section 15 of Title 15 of the United States Code, and that which is assessable in traditional or conventional actions for damages. *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390.

At the argument on the reserved point the court posed a further question as to whether, under the expressed terms of Section 15, *supra*, the court, if required under the force of authority to delete from the judgment the item of damages, could, under the record, still allow the costs, including attorney's fees, as stated in the docketed judgment.

The suit authorized by Section 15 is *sui generis*. The wording of the statute is unique. We have earlier in this memorandum directed attention to the observation of Justice Holmes in the *Chattanooga Foundry* decision, *supra*, as to the differentiation in the element of damages under this law and in the other types of damage suits.

Moreover, it is significant that the Congress itself ordained that the injury denounced by this statute should be redressed in the [76] District Court of the United States "without respect to the amount in controversy," instead of requiring the jurisdictional amount generally necessary in damage litigation in the Federal court between private parties.

In the light of the broad investiture of the court's power in the allowance of costs by the express terms of the Act under which the suit was brought, and giving due consideration to the implied findings of the jury that defendants have injured plaintiffs in their business by unlawfully restraining and monopolizing interstate commerce in the public entertainment field, we think that the costs of suit, including the plaintiffs' attorney's fees, should be assessed against the defendants. *American Can Co. v. Ladoga Canning Co.*, (C. C. A. 7, 1930), 44 F. (2d) 763. In the case just cited the court, construing the singular wording of Section 15 of Title 15 of United States Code, said, "The statute authorizing plaintiff's recovery of reasonable attorneys' fees directs their inclusion as a part of the costs. We find nothing in this statute which limits this allowance to services rendered in the District Court. Its terms are broad enough to include plaintiff's reasonable attorneys' fees necessarily incurred in any court wherein the cause was pending. A similar construction has been placed on a similar statute." *Davis v. Parrington*, (C. C. A.), 281 F. 10. See, also, *Davis Agent, v. Parrington, etc.*, (C. C. A. 9), 281 F. 10;

Louisville & N. R. Co. v. Dickerson, (C. C. A.), 191 F. 705.

The unusual and broad character of the remedy provided by Section 4 of the Act of October 15, 1914, now Section 15, Title 15, U. S. C. A., relating to unlawful restraints and monopolies in interstate commerce is the subject of a scholarly and analytical article by Professor [77] Lawrence Vold, published January, 1940, in Volume XXVIII, Kentucky Law Journal. The title of this instructive material is "Are threefold damages under the Anti-trust Act Penal or Compensatory?" In aptly describing the components in the remedy, the learned authority stated, "x x x, the threefold damage provision is here compensatory in its nature, in liquidating compensation for accumulative intangible harm going beyond the ordinary recoverable legal damages to the business or property."

In ruling upon the defendants' motions under consideration we have followed the procedure directed by the Supreme Court in *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, and have entered this day an appropriate ruling and judgment which embodies the views expressed in this memorandum of conclusions.

Dated June 24, 1946.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Jun. 24, 1946. [78]

United States District Court
Southern District of California
Central Division

No. 4328-M. Civil.

LARRY FINLEY and MIRIAM FINLEY,
Plaintiffs,

vs.

MUSIC CORPORATION OF AMERICA, a Delaware
corporation; H. E. BISHOP and LAWRENCE
BARNETT,
Defendants.

RULING ON DEFENDANTS' MOTIONS FOR
JUDGMENT NOTWITHSTANDING THE VER-
DICT OF THE JURY, AND FOR A NEW
TRIAL, AND JUDGMENT

The above entitled action having been regularly called for trial before the Honorable Paul J. McCormick, United States District Judge, and a jury, on the 29th day of January, 1946, and succeeding days as shown by the record of this court; Messrs. Desser, Rau & Christensen, Wm. Christensen, Esq., and F. Filmore Jaffe, Esq., appearing as attorneys for the plaintiffs, Larry Finley and Miriam Finley; Messrs. Pacht, Pelton, Warne, Ross & Bernhard, Clore Warne, Esq., and Frank P. Doherty, Esq., and Harold F. Collins, Esq., appearing for defendants Music Corporation of America, H. E. Bishop and Lawrence

Barnett; at the conclusion of all of the evidence offered and received for and on behalf of the plaintiffs, and for and on behalf of the defendants, and after all parties had rested, the defendants moved for a directed verdict in their favor, which motion the court denied, and the Judge did thereafter submit the cause to the jury for their consideration; and the jury having rendered a verdict in favor of the plaintiff and against the defendants in the sum of \$55,500.00 as treble damages; and the defendants thereafter within due time made their motions for judgment in their favor notwithstanding the verdict, or, in the alternative, for a new trial in said action; the court having considered the briefs and arguments of counsel, and being fully advised in the premises, does find and adjudge that there is ample and substantial evidence to [79] support and sustain the implied finding of the jury that the defendants have conspired to restrain interstate commerce and to monopolize interstate commerce in that portion of the business of musical entertainment involving bands, orchestras, and attractions furnishing dance music at places of public entertainment, but that the evidence does not adequately disclose any means of determining the amount of damages per se sustained by the plaintiffs with any degree of certainty or definiteness, and therefore that the damages fixed by the jury are speculative and not recoverable under applicable law, and that solely by reason thereof the motion of the defendants for judgment notwithstanding the verdict of the jury should be granted to the extent herein stated, and not otherwise.

Now, Therefore, It Is Ordered that defendants' motion for a judgment in their behalf notwithstanding the verdict of the jury is hereby granted solely as to the specifications relating to monetary damages per se as set forth in Paragraph 2(d) of defendants' motion for a directed verdict at the close of all the evidence, filed herein on February 11, 1946; that defendants' motion for a new trial is denied.

And, Accordingly, judgment is ordered for the plaintiffs, Larry Finley and Miriam Finley, upon all the issues herein, except damages per se, and also for their costs in the sum of \$1592.85, and the further sum of \$7500.00 reasonable attorneys' fees, also as part of their costs herein, making in all the sum of \$9092.85 as their total costs of suit.

Dated June 24, 1946.

PAUL J. McCORMICK

United States District Judge

Judgment entered Jun. 24, 1946. Docketed Jun. 24, 1946. Book 39, page 24. Edmund L. Smith, Clerk; by P. D. Hooser, Deputy.

[Endorsed]: Filed Jun. 24, 1946. [80]

[Title of District Court and Cause.]

MOTION TO REFORM AND MODIFY ORDER,
AND FOR JUDGMENT

Defendants Music Corporation of America, a Delaware corporation, H. E. Bishop, and Lawrence Barnett, and each of them, move said Court to reform and modify its order dated June 24, 1946, which said order is entitled "Ruling on Defendants' Motions for Judgment Notwithstanding the Verdict of the Jury, and for a New Trial, and Judgment", and move said Court for judgment in favor of said defendants, all more specifically as follows:

1) That the whole of the said order and ruling following the recitals thereon, to wit, the whole of the portion commencing with the words "the court" on page 1 at line 31, and to and including the whole of the balance of said form of order as set forth on page 2, be stricken, and in lieu and place thereof the Court rule and order in the following language:

"The Court having considered the briefs and arguments [81] of counsel, and being fully advised in the premises, and having found that the motion of defendants for judgment notwithstanding the verdict of the jury, should be granted,

"Now, Therefore, It Is Ordered that defendants' motion for a judgment in their behalf notwithstanding the verdict of the jury is hereby granted solely as to the specifications relating to monetary damages

per se as set forth in Paragraph 2(d) of defendants' motion for a directed verdict at the close of all the evidence, filed herein on February 11, 1946; that defendants' motion for a new trial is denied; and It Is Ordered that the judgment heretofore rendered and made herein, in favor of the plaintiffs, be and the same hereby is vacated and set aside; and

"It Is Adjudged that plaintiffs take nothing by their complaint herein filed and that judgment be in favor of said defendants, and each of them, against the plaintiffs.

"Dated:

.....
United States District Judge"

The grounds for said motion are that there is no province, power or authority for the Court in granting said defendants' motion to do other than order and direct judgment for the defendants, and to vacate the judgment theretofore rendered, and to render and make a new judgment in accordance with said ruling, and that the procedure proposed upon this motion is in accordance with the Federal Rules of Civil Procedure and the practice of the Courts of the United States.

2) In the alternative and in the event the foregoing [82] motion for order is denied, said defendants move to modify said order and ruling of June 24, 1946, by strik-

ing therefrom the following quoted parts and portions thereof:

a) Commencing with line 33 on page 1, the following language:

“that there is ample and substantial evidence to support and sustain the implied finding of the jury that the defendants have conspired to restrain interstate commerce and to monopolize interstate commerce in that portion of the business of musical entertainment involving bands, orchestras, and attractions furnishing dance music at places of public entertainment, but”

b) Commencing at line 19 on page 2, the following language:

“And, Accordingly, judgment is ordered for the plaintiffs, Larry Finley and Miriam Finley, upon all the issues herein, except damages per se, and also for their costs in the sum of \$1592.85, and the further sum of \$7500.00 reasonable attorneys’ fees, also as part of their costs herein, making in all the sum of \$9092.85 as their total costs of suit.”

The grounds for said motion are as follows:

As to specification (a), said portion is erroneously and improperly included in the form of ruling and order, and that there is no power or authority for the Court, upon ruling on the motions before it, to make or purport to make any finding of fact as to any issue tendered in the

case or tried to the jury, and that said portion of the order is surplusage and made without authority.

As to specification (b), there is no authority under any statute or law of the United States granting power or authority to [83] the Court to order or direct a judgment in favor of the plaintiffs for costs and attorneys' fees in an action, as here, where plaintiffs have not shown they are injured in their property, and are not entitled to a judgment for damages for such injury, and the granting of any judgment in favor of plaintiffs as ordered by said portion sought to be stricken, is erroneous.

Said motions are made and based on the records and files in said cause, the minutes of the Court, said orders and judgment specifically referred, this motion, and points and authorities filed in support hereof.

Dated: July 5, 1946.

FRANK P. DOHERTY

HAROLD F. COLLINS

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

By Bernard Reich

Attorneys for Said Defendants [84]

Received Copy of the within Motion to Reform & Modify this 5 day of July, 1946. Dessler, Rau & Christensen, Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 5, 1946. [85]

[Title of District Court and Cause.]

[ORDER DENYING MOTION TO REFORM AND
MODIFY ORDER AND JUDGMENT]

The motion of defendants to reform and modify the order dated June 24, 1946, and for judgment in favor of said defendants, is denied in toto.

Dated August 8, 1946.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Aug. 8, 1946. [86]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS

Notice Is Hereby Given that Larry Finley and Miriam Finley, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth District from the Ruling on defendants' Motion for Judgment Notwithstanding the Verdict of the Jury and for a New Trial, and from the Judgment entered in this action on June 24, 1946.

Dated: This 21st day of September, 1946.

DESSER, RAU & CHRISTENSEN

By F. Filmore Jaffe

Attorneys for Plaintiffs [87]

[Affidavit of Service by Mail.]

[Endorsed]: Filed & mld. copy to Pacht, Pelton, Warne, Ross & Bernhard, Attys. for Defts. Sep. 21, 1946. [88]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants, Music Corporation of America, a corporation, H. E. Bishop and Lawrence Barnett, jointly and severally, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from those certain orders and judgments herein, and parts thereof, as follows:

1. From that certain part and portion of the order and judgment of the Court made and entered June 24th, 1946, which said order is entitled "Ruling on Defendants' Motions for Judgment Notwithstanding the Verdict of the Jury, and for a New Trial, and Judgment", and which said portion of said order and judgment appealed from is in words and figures as follows:

"that there is ample and substantial evidence to support and sustain the implied finding of [89] the jury that the defendants have conspired to restrain interstate commerce and to monopolize interstate commerce in that portion of the business of musical entertainment involving bands, orchestras, and attractions furnishing dance music at places of public entertainment,"

and together with the following part of said order and judgment, to wit:

"And, Accordingly, judgment is ordered for the plaintiffs, Larry Finley and Miriam Finley, upon all the issues herein, except damages per se, and also for their costs in the sum of \$1592.85, and the further

sum of \$7500.00 reasonable attorneys' fees, also as part of their costs herein, making in all the sum of \$9092.85 as their total costs of suit."

2. From that part of the order and judgment made and entered June 24th, 1946, and entitled "Ruling on Defendants' Motions for Judgment Notwithstanding the Verdict of the Jury, and for a new Trial, and Judgment," which denies defendants' motion for a new trial, and which said appeal is taken and is to be considered upon the contingency and only in the event that the part of said judgment and order of the Court so made and entered which grants defendants' motion for a judgment in their behalf notwithstanding the verdict of the jury, is reversed.

3. From the order of the Court dated and filed August 8th, 1946, which refused to re-assess and re-tax costs, and denied said defendants' motion to reform or modify the order of the Court dated [90] June 24th, 1946, and grant judgment for the defendants, and from each and every part thereof.

Dated: September 23rd, 1946.

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

Attorneys for Said Defendants

[Endorsed]: Filed, mld. copy to Desser, Rau & Christensen Sep. 23, 1946. [91]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL
WAIVING BOND, ETC.

Plaintiffs, Larry Finley and Miriam Finley, and defendants, Music Corporation of America, H. E. Bishop and Lawrence Barnett, have respectively appealed from the order, or parts thereof, made and entered by the Court herein on June 24, 1946, and said parties have designated portions of the record on appeal necessary to be contained in the record on appeal. This stipulation is for the purpose of facilitating and agreeing upon appropriate record on appeal, and as to other matters incident to said appeal as herein set forth.

Said parties, by and through their respective counsel, stipulate and agree as follows:

1) A single record on appeal shall be prepared and the matters designated by each of the parties upon the appeal taken shall be included in said record without duplication. The cost of the preparation of the Clerk's record on appeal will be paid one-half by [97] each of the said parties respectively, plaintiffs and appellants and defendants and appellants, said amount to be paid when the Clerk presents his estimate of the cost of said record.

2) There is to be included in the reporter's transcript all of the evidence and proceedings had upon the trial of said action and it shall be sufficient for the plaintiffs and appellants to file one copy of the reporter's transcript of the said evidence and proceedings in lieu of the two copies provided by Rule 75, said parties having stipulated heretofore acknowledging receipt of a copy of said reporter's transcript.

3) All of the original papers and exhibits shall be sent to the Court of Appeals in lieu of copies.

4) There shall be included in said Clerk's record of proceedings certain instructions requested by the defendants and refused by the Court, to wit:

Defendants' Requested Instruction No. 35

Defendants' Requested Instruction No. 37

Defendants' Requested Instruction No. 43

Defendants' Requested Instruction No. 44

Defendants' Requested Instruction No. 49

Defendants' Requested Additional Instruction No. A

Defendants' Requested Additional Instruction No. C

Defendants' Requested Additional Instruction No. D

Defendants' Requested Additional Instruction No. F

5) Each of the parties hereto waives bond for costs on appeal and plaintiffs and appellees, Larry Finley and Miriam Finley, stipulate and agree to a stay of execution of the judgment of said case and the spreading of the mandate of said final judgment in the District Court and supersedeas bond is hereby waived.

6) The time within which the record on appeal on the part of all appellants herein may be filed with the Appellate Court is hereby extended, by and with the consent of the said District [98] Court, to and including the 10th day of December, 1946.

Dated: October 23, 1946.

DESSER, RAU & CHRISTENSEN

By Jack L. Rau

Attorneys for Plaintiffs, Appellants and Appellees,
respectively, Larry Finley and Miriam Finley

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

Attorneys for Defendants, Appellants and Appel-
lees, respectively, Music Corporation of
America, H. E. Bishop and Lawrence Barnett

It Is So Ordered.

Dated: October 25, 1946.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Oct. 26, 1946. [99]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 99, inclusive, contain full, true and correct copies of Complaint for Damages and Injunction Under Sherman Anti-Trust Act; Answer to Complaint; Minute Order Entered February 6, 1946; Amended Complaint for Damages and Injunction Under Sherman Anti-Trust Act; Defendants' Requested Instructions Nos. 44, 43, 35, 37, and 49; Defendants Request for Additional Instructions Nos. A, C, D and F; Verdict of the Jury; Application for Attorney's Fees, Attorneys for the Plaintiffs; Minute Order Entered March 21, 1946; Judgment; Memorandum of Costs and Disbursements; Stipulation re Costs; Motion for Defendants for Judgment Notwithstanding the Verdict; Defendants' Motion for New Trial; Partial Ruling

on Defendants' Motions for Judgment Notwithstanding the Verdict of the Jury and for New Trial; Memorandum of Conclusions on Defendants' Motions for Judgment Notwithstanding the Verdict of the Jury and for New Trial; Ruling on Defendants' Motions for Judgment Notwithstanding the Verdict of the Jury and for a New Trial and Judgment; Motion to Reform and Modify Order and for Judgment; Order Denying Motion to Reform and Modify Order and for Judgment; Plaintiffs' Notice of Appeal; Defendants' Notice of Appeal; Plaintiffs' Designation of Record on Appeal; Defendants' Designation of Record on Appeal and Stipulation and Order re Record on Appeal, Waiving Bond, etc. which, together with Original Reporter's Transcripts of Proceedings on September 28, 1945, December 21, 1945, January 29, 30 and 31, 1946, February 1, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15, 1946, March 21, 1946 and June 14, 1946 and Original Plaintiffs' Exhibits Nos. 1 to 13 inclusive and Original Defendants' Exhibits A to R-1, inclusive, transmitted herewith, constitute the record on the appeals of Plaintiffs and Defendants to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$18.40 one-half of which has been paid by Plaintiffs-Appellants and one-half of which has been paid by Defendants-Cross-Appellants.

Witness my hand and the seal of said District Court this 21 day of November, A. D. 1946.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause.]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, January 29, 1946

Appearances:

For the Plaintiff: Desser, Rau & Christensen, by William H. Christensen, Esq., and F. Filmore Jaffe, Esq.

For the Defendants: Pacht, Pelton, Warne, Ross & Bernhard, by Clore Warne, Esq.; and Frank P. Doherty, Esq.; and Harold F. Collins, Esq.

Los Angeles, California, Tuesday, January 29, 1946.
2:00 P. M.

(A jury was duly empaneled and sworn.)

Opening Statement on Behalf of Plaintiff

Mr. Christensen: May it please the court, counsel, and you, ladies and gentlemen of the jury:

This is, as you know, called an opening statement. The function of an opening statement is simply to enable you to better follow the evidence as you hear it. It is not evidence, and I will not attempt to tell you in detail the evidence which will be presented.

The Mission Beach Amusement Center is a playground and recreational center situated in and owned by the City of San Diego. I believe it is the only beach amusement center in the city of San Diego. It consists, among other things, of various concessions, a plunge, a roller skating rink, and the Mission Beach Ballroom. I told you it was and is owned by the City of San Diego.

For a period of approximately five years prior to the 3rd of January of last year, it was under lease to Mr. Daillard, whom you have heard mentioned here. The lease was expiring at the end of the year, and the City of San Diego published a notice inviting bids of persons to lease the entire amusement center openly and competitively. Mr. Finley, Larry [2*] Finley, as I call him and will probably continue to do it, Larry Finley has been in the band and entertainment business for about fourteen years. He was at one time a band leader himself. Since May, I believe it is, of 1944, he owned and operated the Trianon Ballroom in the city of San Diego. Since September of that year he was the managing operator of the Casino Gardens, a ballroom located down here at Ocean Park, a portion of the city of San Diego commonly known as Ocean Park. He had gone to San Diego on another enterprise originally, but became interested in the general welfare particularly of the servicemen in and about the city of San Diego. So when he saw the notice that bids were to be let, he made inquiry and then he knew, of course, that in order for it to be operated, for any first-class ballroom to be operated profitably, it is necessary to have what is known as name bands.

Name bands, I believe the evidence will show, are almost what the name suggests, much like a star in motion pictures, that the name would be known to the man on the street. It is a band which has attained national prominence by reason of its activities in radio, through records, exploitation and playing for a period of time.

So he went to the Music Corporation of America and there he talked with Mr. Hal Howard, one of their representatives. He told Mr. Hal Howard that he was think-

*Page number appearing at top of page of original Reporter's Transcript.

ing about, if he could [3] make satisfactory arrangements, making a bid on that park, and asked if they could service him with their bands, they having the control of the great majority of name bands in the United States. And I think the evidence will show that over ninety per cent of the name bands available to operators in San Diego are handled by them.

Mr. Hal Howard said to Mr. Finley, "Well, Mr. Daillard is now operating a place, and we furnish him bands. Now that he has taken over the Pacific Square Ballroom, I don't see any reason why we can't furnish you, too, with bands for the Mission Beach Ballroom."

Mr. Finley went and saw others. They have in that industry what is known as the "Big Three," the William Morris Agency, the General Amusement Corporation, and, of course, the Music Corporation of America. He talked with the people from the General Amusement Corporation, also the William Morris Agency, and while they have very few bands available here, they, too, said they would assist him.

After doing that, he prepared his bid. It will be here before you. Attached to that are many letters of references, particularly from the places where he had been in business before, and one of which was the place where he was in business in the city of Burbank.

The Council of the City of San Diego considered the bids. Mr. Daillard, and when I say Mr. Daillard, I believe a man by [4] the name of Ed Wakeland had an interest in the matter too, but Mr. Daillard was the man that was operating it, and Mr. Daillard and Mr. Wakeland put in their bid. Mr. Finley put in his bid, and I believe there were several others; a few others, at least,

Mr. Finley's bid, I might say, offered to pay the City of San Diego a lower percentage of the gross profits, the gross receipts, than did Mr. Daillard's bid. However, the City of San Diego, acting through its legislative body and mayor, considered those bids and determined that Mr. Finley was the man who should have the Mission Beach Amusement Center.

Then after—oh, yes, I forgot to tell you that Mr. Finley went and got letters from the William Morris Agency and from the General Amusement Corporation advising the City Council of the City of San Diego that they would do what they could to furnish him with bands. The Music Corporation of America, Mr. Bishop and Mr. Barnet, learned of this and did everything they could to cause the representatives of the General Amusement Corporation and the William Morris Agency to retract that, or at least write a letter to Wayne Daillard saying that they would not service him with the bands. That, however, was unsuccessful.

Then the bids were let, and the next thing we find is that Mr. Finley had been awarded the lease of the Mission Beach Amusement Center, including the ballroom. Then he went [5] again back to see the representatives of the Music Corporation at their office. It is located in the city of Beverly Hills, if you happen to know, and he again asked them if they would furnish him with bands. They told him that they would see if they could work something out for him, and kept putting the matter off. [6]

Then the time became very short to open. He took over on the 3rd day of January, so Mr. Daillard could have the benefit of New Year's, and immediately then closed the entire park and spent a large sum of money in

modernizing it, including the ballroom, beautifying it. In the ballroom he made extensive alterations and beautifications, put in an entirely new sound system.

The ballroom, I believe you will find—and we have some pictures we will show you of it—is a very beautiful place. It has approximately 22,000 feet, square feet, in area.

I told you that he had gone back after he got the bid and tried to get them to agree to furnish him with bands. This they again put off and said it was a little too early to answer.

Again, on or about the 15th day of January, 1945, Mr. Finley again visited the defendants and again asked that he be furnished name bands for use at Mission Beach.

They told him that they could not furnish him with any.

He then attempted to get them to furnish him with what we would call attractions, you know, to appear with a band there. To mention just a few of them, such artists as Bonita Granville, the King Sisters, Laurel and Hardy, Frank Sinatra. To which the Music Corporation of America, as agents, again told them they would think it over and advise [7] him, except they said they would furnish him with the King Sisters, which is a singing act, as I know it, for a two-day engagement there February 11th and February 12th of 1945.

It took them about a month to complete the work on modernizing and beautifying, etc., that Mr. Finley did on the park; and they opened on February 11th.

Music Corporation of America agreed to furnish the King Sisters for the 11th and 12th of February at an agreed price of \$1,500.00 for the engagement; told them,

You have it. We will prepare the contracts and we will mail them to you and send them down to you at San Diego."

Relying upon that promise, Mr. Finley advertised that fact and expended several hundred dollars in doing that.

He called the office of Music Corporation of America on occasions, telling them that the contracts had not arrived yet. What happened? Why don't I get them? One thing and another. But no direct answer.

The next thing that he knew of it, he read in the papers of San Diego that the King Sisters had been booked by Music Corporation of America into the Pacific Square Ballroom.

Then about the 3rd of February or shortly before that—I have already told you, I believe, that he made several attempts to get other bands—they offered him Vaughn Monroe, or at least they offered him some band, but nothing of any importance there, but this Vaughn Monroe was the act. I should [8] tell you that Vaughn Monroe has with his orchestra a singing group, and while Pacific Square had never had a singing act in its place before, when Larry Finley said he wanted it for that, Music Corporation of America promptly booked the King Sisters into play at the Pacific Square.

Pacific Square, as I have already told you, is a ballroom in the City of San Diego. It is located down there near the freight depot in the City of San Diego, right on the main highway—I think it is Pacific Highway—and was at least at that time owned and operated by Daillard.

About the 12th day of February of 1945, after being, to use a vernacular phrase, kicked around or pushed around by Music Corporation of America—

Mr. Warne: If the court please, could we ask that Mr. Christensen keep his voice up a little? It is somewhat difficult to hear him over here.

The Court: Yes. Raise your voice.

Mr. Christensen: Thank you, Mr. Warne. I did not know that, and I will stand back a little bit.

As I say, on or about the 12th of February, Mr. Finley went to the office of Mr. Joe Ross, a member of the law firm of Pacht, Pelton, Warne, Ross & Bérnhard, one of the counsel here now representing the defendant, and talked to Mr. Ross at his office in the Union Bank Building and told him that he was contemplating filing this action against Music Corporation [9] of America because of their actions in not giving him any name bands and giving them all to his competitor.

Mr. Ross told him that he would try to straighten the matter out and that he was in sympathy with Mr. Finley on account of the Music Corporation of America's actions. Thereafter there were some other matters along the same line, which I will not attempt to detail for you, but which the evidence will show it became necessary because of the actions of Music Corporation of America for Mr. Finley to make repeated trips to the East and to make direct bookings of all the bands in order to get any at all.

Mr. Finley, I have told you, operates the Casino Ballroom down at Ocean Park. There the Music Corporation of America will furnish him bands, their name bands, notwithstanding the fact that another first-class ballroom, the Aragon Ballroom, is located only one block away.

Music Corporation of America furnished bands to Wayne Daillard. Wayne Daillard was operating both the Mission Beach and the Pacific Square.

Music Corporation of America furnished name bands to the Pacific Square Ballroom when it was operated by Wayne Daillard.

Wayne Daillard and Music Corporation of America have a contract, the language of which is, I believe, "The first refusal." We will show you by the evidence that, while it is [10] called "a first refusal," it is an exclusive contract.

We will also show you that in the conversations with Mr. Larry Finley with Music Corporation of America's agents, they told him, "We can't give you any bands while you are in San Diego. If you open up, up in Oakland, we will give you all the bands you want. If you open up"—and when he did open up, in partnership with Tommy Dorsey and Jimmie Dorsey in the operation of the Casino Gardens at Ocean Park, they furnished him with all the bands he wanted.

The only place they would not furnish him with any bands was in the Mission Beach Ballroom at San Diego.

We will show you that Music Corporation of America has offices located in other parts of the United States. Before the war they had them in other parts of the world. That their main office is here in the City of Beverly Hills. Their agents travel throughout the United States, or at least they cross state lines in making bookings; that they contract, and in the preparation of the contract through the mails, cross the state lines; that remittances are made throughout the United States and thereby crossing state lines; that the telephone and the telegraph are used in crossing state lines.

We will show you that notwithstanding the fact that Mr. Finley is an experienced operator and that he has made Mission Beach Ballroom a far finer place to go since

he has had it than it was at least for a number of years before that, and [11] that during the operation of Mission Beach Ballroom immediately prior and on what we believe the evidence will show a more or less haphazard operation by Wayne Daillard—but, mind you, with name bands—the profit was approximately \$40,000 of Mr. Daillard. Mr. Daillard's operation was the only other first-class ballroom in the City of San Diego, Pacific Square. The profit was—without attempting to quote it exactly—I say approximately \$170,000 during the year 1945.

Notwithstanding all these things, and because of the refusal of the Music Corporation of America to furnish Mr. Finley with name bands, he has lost to date approximately \$117,000, because of Music Corporation of America's, we would say, monopolistic control of the bands through conspiracies existing between Mr. Daillard and Music Corporation of America.

Thank you, ladies and gentlemen.

The Court: Will you defer your statement, gentlemen, or will you make it now?

Mr. Doherty: I see Mr. Warne motioning to speak to me. I will see what he has to suggest.

We were just arguing, Your Honor, over one of these technical matters, which is of no interest to anyone, and I overruled them. And, as Your Honor indicated that I have the choice of making an opening statement now or at the close of the plaintiff's case, I think it would be to the advantage of [12] the jury to have the picture before them as they go along, to have the statement at this time, if I may, Your Honor.

The Court: Yes, sir.

OPENING STATEMENT ON BEHALF OF
THE DEFENDANTS

Mr. Doherty: Ladies and gentlemen of the jury: As his Honor has indicated in the little brief colloquy we have had in trying these cases, the defendant sits down and waits for the other side to put on his case before he discloses what he has and tips him off. That is not our defense in this case. Our defense is on the merits, and you are going to have the whole story right at the beginning.

The evidence will show that Mr. Finley, while a young man, had some connection in a small way with the entertainment business back in the East. The evidence will show that he was in the jewelry business, first as a salesman, then as a small proprietor in a store out in Burbank up until sometime in—oh, '44. Incidentally, he put on some performances in connection with his jewelry business. In other words, he allowed free tickets to dance halls from his jewelry store, to get people to go to his dance hall and, through the dance hall, patronize his jewelry store.

The evidence will show that his first activity in the dance hall business was some time mid-1944, when he had some connection with the Trianon Ballroom, a small upstairs ballroom in San Diego. Then he bid on this particular enterprise: [13] Before that, I think, in view of the questions of his Honor to you qualifying you as jurors, I had better give you a little background of the American Federation of Musicians and the band business and the Music Corporation of America.

All musicians, whether they are the great symphonies or the dance bands, are, without practically any exception, members of the American Federation of Musicians, known

as the Musicians' Union, a very powerful and influential and efficient union.

They will not permit Music Corporation of America or all of its competitors—and, in various fields they run into, I might say, hundreds or maybe over a thousand—to operate in connection with their musicians without a license that the American Federation of Musicians issues, as it did to the Music Corporation of America.

That is to protect the members of their union so that they will be dealt with fairly. In addition to that, the American Federation of Musicians provide a form of contract that this licensed agent, Music Corporation of America, must have with each band and with each dance hall proprietor. It prescribes the contract, so that the contracts are uniform between the Music Corporation of America and all of its competitors in dealing with band leaders and dealing with dance halls.

The job of the Music Corporation of America, as is the [14] job of its competitors, is to represent the band leaders and attempt to make arrangements—bookings, sometimes they call them, or placements they call them—put them in theatres, put them in moving pictures, dance halls, and what-not, at a compensation.

The American Federation of Musicians have in the contract that they fix the minimum compensation. You can never pay them less than what the American Federation of Musicians say they shall be paid.

That contract is one that is used, and the evidence will show that Mr. Finley knew that; and the evidence will show that, by the terms in the contract, no band leader can be assigned by Music Corporation of America or any other agency without the consent of the band leader. He

must consent to the compensation, to the place he is going to play, and when he is going to play, and the length of time he is going to play.

The evidence will show that any theatre owner, moving picture concern, dance hall operator, can go around the employment agency, the M. C. A., Music Corporation of America, or any other agent and make his deal direct with the band leader. He does not have to go through the employment agency, but can deal direct. And the evidence will show that Mr. Finley did so.

The evidence will show that in 1940 or '41, in San Diego, [15] Mr. Daillard, who had wide experience in the entertainment business, wanted to build a new dance hall. This was over four years before Mr. Finley was ever heard of in the dance hall business.

Mr. Daillard went to the Music Corporation of America and said that he wanted to build a new dance hall in San Diego. There was none down there, and the defense activity began to bring in large numbers of people, and the Navy and the Army and the Marines were building up large forces there, and the Armed Forces members needed entertainment; and he thought it would be a good place to put a dance hall, but he did not want to go forward with a large investment of that sort unless he was assured he could get entertainment. [16]

So he asked in the form of a letter what Music Corporation of America could do for him, and they wrote him a letter giving him the first choice, which he must exercise within forty-eight hours, of taking a particular band or form of entertainment for his place. They said, "We have available this form of entertainment. You have the exclusive on it for forty-eight hours." If he did not take it in forty-eight hours they might place it anywhere they might

see fit. That went into effect and continued in effect until May, 1944. All this long before Mr. Finley was in the business in San Diego. They asked Mr. Daillard and a more formal contract with Music Corporation of America was entered into, setting forth in more detail as to the obligations of one and the obligations of the other. Music Corporation of America had the understanding that they had to use so many bands a year.

Now, keep in mind that these bands are not San Diego bands, and they are not Los Angeles bands. They are bands that move around over the country, just like any other type of showman. They move wherever there are engagements; New York, Florida, California, the Middle West, North and South. Now, I don't know anything about the band business. I don't go around to these places. Now, they have symphony bands, and they are up in his class up here, and then we come down into this class where we are, and they have what they call sweet bands, and they have hot bands, and they have jump and [17] jive bands. I don't know one from the other, but there is a certain taste among the young folks that they like this type or that type of band, or this type or that type of band leader. So Music Corporation of America can't just simply place a band as an employment agency and say, "You have to take this band," and give it to Mr. Daillard. They had to know how many bands he would use in a year, and then they would try to arrange to supply him with bands in the number he requested; so that the contract of 1941, and again of May, 1944, and the evidence will show long before Mr. Finley entered the business in San Diego, will show they had this arrangement, that Mr. Daillard had the exclusive forty-eight hours to elect whether or not he would take certain bands.

The evidence will show that Mr. Daillard, in addition to the so-called Pacific Square, which he built after this first arrangement, was also the operator under the City of San Diego lease of what is known as Mission Beach. He took it when it was nothing, and it was a losing proposition, and he lost money on it, and he built it all up, and in November, 1944, Mr. Finley sought the contract from the City of San Diego and was awarded it. Mr. Daillard had to move out in January, and Mr. Finley moved into Mission Beach. But Mr. Finley had his Trianon Ballroom in San Diego, the upstairs ballroom, from the summer of 1944, which he had been operating, and the evidence will show that he did buy one or two bands [18] from the Music Corporation of America, and had opportunities to buy others, but didn't.

The evidence will show that Mr. Daillard, an experienced operator, realized a city the size of San Diego could not have at the same time, with that limited population, two bands of high calibre competing with each other, that they would destroy each other. Here was Pacific Square in downtown San Diego, and here was Mission Beach seven miles out of town. So Mr. Daillard, in his operation of the Mission Beach, didn't use there what is called your name bands. The evidence will show what is and what is not a name band, and it will be rather a confusing proposition, but let that go, whatever it is. Mr. Daillard, in operating Mission Beach, used what is known principally as acts and western bands, bands that appealed to the type of people who like to go down to beaches and to merry-go-rounds, where they take the whole family, and things of that sort, sort of family affairs. In that way he operated at Mission Beach, and eventually was fairly successful in the proposition.

The evidence will show that when Mr. Finley determined to enter the field at Mission Beach and compete with Pacific Square, he didn't come to the M. C. A., the Music Corporation of America, and say, "Can you give us bands?" He went to the two competitors and got letters from them, and they wrote letters to be used by Mr. Finley in his contract, or offer, or [19] bid to the City of San Diego, so that he could say, "Here are two agencies that can supply bands, and here is their letter that they will supply us with bands," supply Mr. Finley at Mission Beach. And so he was awarded the contract.

The evidence will show that Mr. Bishop, an employee of Music Corporation of America, enthusiastic, working hard for his account, his customer, Mr. Daillard, did attempt to dissuade the competitors from being too active in helping Mr. Finley, putting it on the ground that you can't run two big shows in San Diego, because it isn't big enough a town.

The evidence will show that Mr. Stein, the president of the Music Corporation of America, Mr. Bishop being just an employee, a salesman, did not know anything of these activities, and I think you will find Mr. Finley will admit it. The award was made to Mr. Finley, and he was opening on February 3rd.

The evidence will show that Mr. Finley had bands every week from the time he opened until the time that he—well, as long as he has had them, up to the present time, so far as I know, and that he has never been denied bands, that he has had bands from the General Amusement Corporation, Fredericks Brothers, and William Morris Agency, the main competitors.

The evidence will show that when Mr. Finley started, instead of going around on a businesslike basis, he came

around and said, "You give me bands, or I am going to sue you," and [20] within forty-five days from the time he opened, this suit was filed for \$3,000,000.00—forty-five days from the day that he opened. And in the meantime, the evidence will show, Mr. Finley had bands at Mission Beach, some good bands, and he got bands from these other agencies.

The evidence will show that he had opportunity to get bands from the Music Corporation of America, and did not take advantage of it, and the evidence will show that after he filed suit he didn't want any bands from Music Corporation of America.

The evidence will show that Mr. Daillard, who owned Pacific Square, sold out in the spring of 1945, and that his contract with Music Corporation of America, giving Music Corporation of America—or, rather, giving him from Music Corporation of America the forty-eight-hour exclusive, ended, so that there was no longer any contract down there, and the evidence will show that Mr. Finley never made one request from Music Corporation of America for the period from that time to today. That is what the evidence will show, and it will show most of it by Mr. Finley, out of his own mouth.

The evidence will show there is nothing personal between Music Corporation of America and Mr. Finley; and Mr. Finley engaged with Jimmy Dorsey and Tommy Dorsey in a small way down there at a beach town in Ocean Park, and Music Corporation of America supplied them with bands. There is nothing personal [21] to it.

The evidence will show that when Mr. Finley couldn't get bands, couldn't get them through the agency, that he went to the band leaders direct and got the bands, as he had a right to do.

The evidence will show that there is no monopoly, that there was no restraint of trade, and that what losses Mr. Finley sustained down in San Diego was because Mr. Finley either didn't know the game, tried to do something that wasn't possible of being done down there, or operated on a basis so that he would have here a claim for damages, that he would ask this jury to award him in this case.

I think I have given you sufficient highlights to know there is going to be a law suit.

The Court: Proceed.

Mr. Christensen: Mr. Knox, please.

HARLEY E. KNOX,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Doherty: Your Honor, may it be understood that all evidence offered from now on is subject to our objection that the plaintiff has no claim for the reason that there is no matter involving interstate commerce, that the matter is not a matter of commerce, and that there is no showing here by the [22] plaintiff's opening statement where any wrong has been committed by the defendants, and that the plaintiff's opening statement indicated that the basis of his claim has no merit because there was no wrong committed, according to his statement, by the defendants as against the plaintiff; and that that objection may be deemed to be repeated to the testimony offered by each succeeding witness, a continuing objection.

The Court: It may be so understood, and the objection is overruled excepting as hereafter may be indicated otherwise.

(Testimony of Harley E. Knox)

By Mr. Christensen:

Q. Your name is Harley Knox, I believe? Is that correct, sir? A. That is correct.

Q. What is your business, occupation or profession, sir? A. I am in the creamery business.

Q. You have an official— A. Yes, sir.

Q. That is, the Mayor of the City of San Diego; is that true? A. Yes, sir.

Q. In addition to that, you are the president of the California League of Municipalities, are you not, sir?

A. I am.

Q. Prior to the time that you were mayor of the City of [23] San Diego, you were a member of the City Council there, were you not, sir? A. Yes, sir.

Q. You are familiar with the Mission Beach Amusement Center in the city of San Diego? A. I am.

Q. That is the only beach amusement center in the city of San Diego, isn't it, Mayor Knox?

A. It is the only beach amusement center of like character.

Q. And that Mission Beach Amusement Center is owned by the City of San Diego, is it not?

A. Yes, sir.

Q. And has been for a long period of time, at least?

A. Yes, sir.

Q. It is, and has been for some period of time now, the practice and custom of the City of San Diego to let that entire amusement center to others on a lease basis?

Mr. Doherty: Just a minute. That is not an issue in this case. Object on that ground, and incompetent, irrelevant and immaterial.

(Testimony of Harley E. Knox)

The Court: I didn't think there was any issue on that, that this is a concessionaire of the City of San Diego. I didn't understand that there was any issue raised in the pleadings on that. [24]

Mr. Christensen: My point is this: I want to show it is owned by it, and that they do offer it for lease, and that they do it on open bidding, and that they did that in this case; that the bids were received, and among those bids was a bid from Wayne Daillard. Incidentally, at this time I have a certified copy of that bid, and offer it in evidence.

Mr. Doherty: We have no objection, Your Honor, to offering the bid or the lease, but our objection still stands as to the line of inquiry.

The Court: Is there any question, gentlemen? I didn't understand there was in the discussions on pre-trial. You were not here, Major Doherty, but in those discussions I understood it was conceded that this was a concessionaire.

Mr. Warne: Correct.

The Court: Of the City of San Diego, and pursuant to that arrangement bids were submitted.

Mr. Warne: That is correct.

The Court: I don't see any necessity for taking up our time on that.

Q. By Mr. Christensen: May I then direct your immediate attention to the fact that certain bids were asked for in the latter part of—it was in September, was it not, of 1944?

Mr. Doherty: The same objection, Your Honor.

The Court: Overruled.

(Testimony of Harley E. Knox)

Q. By Mr. Christensen: Is that correct, Mayor? [25]

A. I think the—I am not sure if it was September, but it was late in 1944.

Q. And pursuant to your advertisement for bids, there were several bids, at least, submitted?

A. That's right.

Q. One of the bids was by Wayne Daillard, Wayne W. Daillard; that is correct, sir? A. That's right.

Q. And also the plaintiff in this action, Mr. Larry Finley, submitted a bid? A. Yes, sir.

Q. And there were several others?

A. I think there was at least one other.

Q. The City Council, or yourself, considered all of those bids, did you? A. Yes.

Q. And Mr. Finley's bid offered to pay the City a little less than the others, did it not?

A. That's right.

Q. After the consideration of all of the bids which had been submitted, the City Council determined that Mr. Finley's bid was the best bid; is that correct?

A. Not from a financial standpoint, but from the promised character, improvement in character, of the center, and it was for that reason. [26]

Mr. Doherty: I submit that is a conclusion of the witness and should be stricken. The document is the best evidence.

The Court: That is true. The question was not objected to, however. I will permit the answer to stand. Proceed.

Mr. Christensen: Had Your Honor finished?

The Court: Yes.

(Testimony of Harley E. Knox)

Q. By Mr. Christensen: Were you familiar with the operation of the Mission Beach Amusement Center under Mr. Daillard? A. I was.

Q. Are you familiar with it during the time it has been operated by Mr. Finley? A. I am.

Q. Was there a difference in the operation?

Mr. Doherty: Objected to on the ground it calls for a conclusion of the witness; incompetent, irrelevant and immaterial; and is outside the issues of this case.

Mr. Christensen: I propose to show that the Beach has been operated, and particularly the dance hall, has been operated in a much better fashion; that it was at that time, under Mr. Daillard's operation, a very unsatisfactory operation. As a matter of fact, there were constantly reports—

The Court: Just stop right there. I want to establish my rule here right at the outset that I don't want any argument [27] on objections unless I ask for it. That applies to both of you. I am directing it to you now, Mr. Christensen.

Mr. Christensen: Yes, your Honor.

The Court: And when you ask a question and it is objected to, I don't want any argument from either of you, either in elaboration of the objection, or in protest against the objection. That applies to all counsel on each side. The objection is sustained.

Q. By Mr. Christensen: Will you tell me if Mr. Finley has done the things which he promised to do in his bid?

Mr. Doherty: That would call for a conclusion of the witness, and the same objection.

(Testimony of Harley E. Knox)

Q. By Mr. Christensen: Of your own knowledge? May I add that to the question?

The Court: You can elicit what he has done, but you cannot frame a question in that manner.

Q. By Mr. Christensen: Mr. Knox, will you tell me what Mr. Finley has done since he has been the lessee of Mission Beach?

A. He has complied in every way that I know of with the terms of his contract.

Mr. Doherty: I submit, your Honor, that is a conclusion of the witness, and I ask the answer be stricken as a conclusion. [28]

The Court: Motion denied.

Q. By Mr. Christensen: If there were any complaints against the operation of Mission Beach, would those matters come to your attention as mayor of the City of San Diego? A. Yes, sir.

Q. Have there been any complaints made?

Mr. Doherty: I object on the ground it is not within the issues of this case.

The Court: Overruled.

The Witness: The complaints—I don't remember that I have had a complaint during the past year on the operation of Mission Beach.

Q. By Mr. Christensen: Will you tell me—will you describe the operation of Mission Beach while it was operated, let us say, during the last year of Mr. Daillard's operation there?

Mr. Doherty: I object on the ground it is incompetent, irrelevant and immaterial, and not an issue in this case.

(Testimony of Harley E. Knox)

The Court: In view of the opening statement of the defendants I shall permit the question.

The Witness: Will you repeat the question?

Mr. Christensen: The reporter will read it.

(The question was read.)

The Witness: The operation was totally unsatisfactory from a municipal viewpoint. Law and order did not prevail in [29] the Amusement Center. I made several trips there, inspection trips, myself, took my family with me, and succeeded only in getting insulted for the mere privilege of going into the place. As you know, we had a high military concentration in the San Diego area, and the place was literally swarming with servicemen. No policeman, no private guards, were employed, that I know of. I couldn't find any. The rest rooms were in a disgraceful condition. Sailors, Marines, Soldiers walked about the place clearly intoxicated, carrying bottles of liquor openly by the neck, swinging them around. Fist fights were common, and the operation was of such a character that the City Council determined in its call for bids that money would be a secondary consideration, and that the character of the operation must be the first consideration.

Q. Mr. Knox, is it true now that liquor is not permitted on the Amusement Center at all?

A. That is correct. By that I mean beer, I think, is permitted to be sold in one of the cafes, but whiskey and the heavier liquors are not sold or permitted to be on the premises.

(Testimony of Harley E. Knox)

Q. Did Mr. Finley make any changes or improvements or alterations in the Mission Beach Amusement Center? A. He was required to by his contract.

Q. Did he do that? [30] A. He did.

Q. Do you remember Mr. Daillard approaching you at the time when this bid was under consideration?

A. Yes, sir.

Q. Can you fix the time a little more definitely for us, sir?

A. No, I cannot. In fact, at one time I had a memorandum from him in writing on it, and I have been unable to locate that memorandum. I am under the impression it was the summer of 1944. Mr. Daillard approached me in my office with reference to this contract.

Q. Will you relate the conversation, sir?

Mr. Doherty: Object on the ground it is hearsay, and no foundation laid so as to be binding on the defendants, and incompetent, irrelevant and immaterial.

The Court: Now, I don't want any argument unless I ask you for it.

Mr. Christensen: I am not going to.

The Court: Objection sustained.

Mr. Christensen: Could I ask your Honor to bear in mind the fact that we allege him to be a co-conspirator.

The Court: Yes, I have that in mind. A foundation must be laid for conversations regardless of to whom they relate.

Q. By Mr. Christensen: Was there any person, other than yourself and Mr. Daillard, present at the conversation, sir? [31] A. Yes, sir.

(Testimony of Harley E. Knox)

Q. Who was that?

A. Mr. Emil Klicka, Mr. Daillard's associate, and Mr. Walter W. Cooper, City Manager of the City of San Diego.

Q. Where was the conversation held, sir?

A. In the mayor's office.

Q. Now, will you relate to me the conversation that you had with Mr. Daillard at that time, sir?

Mr. Doherty: The same objection, your Honor. There is no allegation of conspiracy existing at that time.

The Court: Objection overruled.

The Witness: A Mr. Daillard and Mr. Cooper and Mr. Klicka came to my office by appointment, which they had requested, and asked what my reaction would be to an extension of one year of Mr. Daillard's lease, and I informed Mr. Daillard that I felt it was the consensus of opinion of the City Council, and it certainly was my own, that the character of the operation of Mission Beach would either be improved or the Mission Beach Amusement Center would be closed; and at that time he told me—in fact, at that time I told him that I favored calling for bids with a very specific set of specifications, requiring performance under the contract, and making that secondary to the financial consideration, and was told by him that that would be useless, that no one but Mr. Daillard could bid on the Amusement Center successfully, and he showed [32] me his contract, or a copy of it, which I did not read, with Music Corporation of America, and indicated to me that in the event that he were not the successful bidder, that there would be no dance operations with name bands in the Mission Beach dance hall.

(Testimony of Harley E. Knox)

Q. By Mr. Christensen: Mr. Knox, do you recall any discussion whatsoever among the council concerning the statement in Mr. Daillard's bid, as follows:

Mr. Doherty: Just a minute. That is objected to. Your Honor is familiar with that statement, I think, from the pretrial hearing.

The Court: Yes, sir.

Mr. Doherty: That is certainly hearsay, and incompetent, irrelevant and immaterial, and without the issues of this case.

The Court: Yes, I think you should not read from a document without disclosing to the jury the full contents of it.

Mr. Christensen: It has been offered into evidence, your Honor.

Mr. Doherty: Subject to the objection I have heretofore made as to hearsay as to the defendants, and without the issues of the case, and incompetent, irrelevant and immaterial.

The Court: Is this the one that was used at the pre-trial? [33]

Mr. Warne: That is right. This is the one Mr. Daillard used in connection with the pre-trial, or, in connection with the deposition which was taken.

The Court: May I see it?

(The document referred to was handed to the court.)

Mr. Warne: No foundation laid, your Honor.

Mr. Christensen: It has been certified to by the City Clerk.

The Court: Will you read the question, Miss Reporter?

(Testimony of Harley E. Knox)

(The question was read.)

The Court: Objection sustained to the question.

Q. By Mr. Christensen: Mr. Knox, was there any discussion among the City Council, in the consideration of the bids, of the question of whether or not it would be practical for any person other than Mr. Daillard to operate Mission Beach Ballroom?

Mr. Doherty: Just a minute. That is hearsay; incompetent, irrelevant and immaterial.

The Court: Overruled. Answer it "Yes" or "No."

The Witness: A. Yes.

Q. By Mr. Christensen: Are you familiar with the ballroom itself, the Mission Beach Ballroom?

A. Yes, sir.

Mr. Christensen: I would like to identify some of the pictures. We have a copy, and counsel can look at them at the [34] same time.

Q. By Mr. Christensen: Will you look at these pictures, the first one I have, and tell me if you recognize that picture. (Handing document to witness.)

A. Yes, sir, that is a picture of the Mission Beach Ballroom.

Q. That is a fair representation of the matters and things which are therein shown? A. I think so.

The Court: Are we going to take up time on this, gentlemen, or can you look at them and stipulate?

Mr. Warne: I think we can. These have never been submitted to us before. If counsel will indicate when they were taken, we may be able to agree.

The Court: Otherwise we will be taking up a lot of time with these things. But if you can't agree, we

(Testimony of Harley E. Knox)

will have to explore it. You certainly should be able to agree upon it.

Mr. Christensen: Mr. Warne, they were taken yesterday by Mr. Al Penrose, captain of the city fire department of the City of San Diego.

The Court: Perhaps they have not seen them before.

Mr. Warne: I have never seen them before. I suggest you pass to something else, and we will check them.

Mr. Christensen: You have copies there.

Q. By Mr. Christensen: Prior to letting the bid, was [35] any investigation made of Mr. Finley by the City Council, or by yourself?

A. The investigation of Mr. Finley was referred to the City Manager, if I remember correctly.

Q. There were a number of letters of commendation attached, were there not?

A. I received letters of recommendation for Mr. Finley, as I did for all bidders.

Q. Are you familiar with the Pacific Square Ballroom? A. I have been there, yes.

Q. Where is it located, sir?

A. At Pacific Highway and Ash Street, San Diego.

Q. That is right seaward or backs up to the railroad tracks there, does it not?

A. At the southwest corner of Pacific and Ash. The southeast corner of Pacific and Ash,—correction.

Q. Can you compare the two ballrooms in appearance?

Mr. Doherty: Object. No foundation laid. I object on that ground, and it is hearsay, incompetent, irrelevant and immaterial.

(Testimony of Harley E. Knox)

The Court: I don't know whether the mayor is an expert on that or not.

The Witness: No, sir, I am not.

The Court: All right. He says he is not.

Mr. Christensen: That is all. Thank you. You may [36] examine, counsel.

If you will look those over and let me know.

Mr. Warne: We are willing to stipulate, your Honor, that the three photographs, copies of which were handed to us—or, we are willing to stipulate that the four photographs which are presented to us by counsel are photographs from various angles of the interior of the Mission Beach Ballroom, taken in the daytime and when obviously no one was present.

The Court: Is that satisfactory?

Mr. Christensen: That is satisfactory, your Honor.

Mr. Warne: It represents its present, current condition?

Mr. Christensen: That is correct, sir.

The Court: Show them to the jury, and ask them if they want to look at them.

(The photographs referred to were marked as Plaintiff's Exhibits Nos. 1, 2, 3 and 4, and were received in evidence.)

Mr. Doherty: Shall I cross-examine?

The Court: Yes.

Mr. Doherty: Or shall I wait until the jury have an opportunity to look at the pictures, while they have their attention diverted, or shall I proceed now?

The Court: I think you may proceed.

Mr. Doherty: Proceed now?

The Court: Yes. [37]

(Testimony of Harley E. Knox)

Cross-Examination

By Mr. Doherty:

Q. Mr. Knox, during 1944 there were a great number of service men in the San Diego area, were there not? A. Yes, sir.

Q. In other words, there were very heavy movements of troops by the Navy, Marine Corps and the Army out of San Diego during 1944, and that is when they were building up for the great battles in the Pacific?

A. At least they were there.

Q. That was really your maximum force that was moved out in 1944, was it not?

A. I am not an Army expert, a military expert. They were there in the city.

Q. You were mayor of the city during that time, were you not? A. I was.

Q. Didn't you see great numbers of troops, and sailors and Marines, in greater numbers around San Diego during 1944 than you saw subsequent to that time and, in fact, prior to that time?

A. No, sir. I think that our concentration during all of 1942, '43 and '44 was about the same.

Q. In 1945 it slid off? A. Yes. [38]

Q. Now, the military, and when I say "the military," I mean the Marine Corps and the Navy and the Army, have their own law enforcing officers, do they not? That is, the Military Police operating for the Marines and the Army and the Shore Patrol for the Navy?

A. I know there are both Shore Patrol and Military Police.

(Testimony of Harley E. Knox)

Q. And they operate in conjunction with your police force in San Diego? A. That's right.

Q. And you have sort of a working arrangement down there that your own police do not arrest the servicemen, but you sort of turn them over to the military authorities to be handled, do you not?

Mr. Christensen: To which we object as being immaterial to the issues here presented.

The Court: Overruled.

The Witness: That matter is something that I can't be too sure of, in that I would have nothing to do with the operation of the police department. I do know that in the regular prowl cars some of them have a Shore Patrol, a Military Police, and a civilian policeman in them, but just how that police operation is carried on I can't answer.

Q. By Mr. Doherty: You don't know then that there was a uniform understanding in your city between the military [39] authorities, and by that I mean the Navy, the Army and the Marine Corps, that their law-enforcing officers, the Shore Patrol men and the Military Police, were going to handle the men in uniform, and your civilian police were going to leave those to the military authorities, and you were going to attend to the civilians?

A. I knew of no such arrangement.

Q. You didn't know of any such arrangement?

A. No, sir.

Q. Now, at Mission Beach during 1944, there were members of the Shore Patrol over there when you went over with your wife on that occasion?

A. I saw none.

(Testimony of Harley E. Knox)

Q. You saw none? A. No, sir.

Q. Did you see any Shore Patrol representatives at all?

A. No, sir. There was a headquarters there, an office there, I think.

Q. But you did see men in uniform who were intoxicated? A. That is correct.

Q. And you saw that same condition on the streets in San Diego, didn't you? A. Occasionally.

Q. Just occasionally? A. That's right. [40]

Q. You saw it all over at Mission Beach and not on the streets in San Diego?

A. I didn't say none, sir. I say occasionally. The streets of the city of San Diego were policed to a far greater degree than were the streets of the Amusement Center at Mission Beach.

Q. Then you do know something about the police department in San Diego?

A. As an observation, as a civilian, yes, sir.

Q. And you went over to Mission Beach and made those observations? A. Yes, sir.

Q. How many times were you over there?

A. I imagine about six or eight times.

Q. In what period of time?

A. Over a period of the last—well, during, particularly during the period of the summer of 1944.

Q. By the way, on the City Council did you have a member, at the time the contract was awarded, by the name of Mr. Austin? A. Yes, sir.

Q. And did he have a son? A. Yes, sir.

Q. Is that the same son that has been employed by Mr. Finley over at Mission Beach since he got the lease? [41] A. Yes, sir.

(Testimony of Harley E. Knox)

Q. The same gentleman? A. Yes, sir.

Q. You know that son is being paid \$1,000.00 a month by Mr. Finley in that position, don't you?

A. No, sir, I don't know what his salary is.

Q. You knew he wasn't in the entertainment business or the amusement business until the City Council handed Mr. Finley the lease, don't you?

A. Are you referring to Mr. Austin?

Q. Yes.

A. Mr. Austin has been in the amusement business for a long time.

Q. His son?

A. I am talking about his son. I am talking about the councilman's son, Warner Austin. Yes, he has been in the amusement business.

Q. In the dance hall business?

A. No, I wouldn't say dance hall, no, sir.

Q. He had not been employed by Mr. Finley over at the Trianon, had he? A. No, sir.

Q. He was first employed after you gentlemen voted Mr. Finley the lease on Mission Beach?

A. I think that's right, sir. [42]

Q. Now, before Mr. Daillard,—let's go back to 1938 and 1939. Mission Beach was out of business, out of operation, wasn't it, and it was sort of a dead horse?

A. I think it had not yet been turned over to the city, sir.

Q. In other words, you got it by some arrangement with the taxing authorities, didn't you?

A. I think the State Park Commission turned it over to the city.

(Testimony of Harley E. Knox)

Q. It was owned at one time or was with the Spreckels' interests, and they turned it over to the State, and the State turned it over to the city?

A. I think that's right.

Q. And the contracts were entered into with Mr. Daillard, and what was done during the five years before Mr. Finley came in was the result of Mr. Daillard's efforts there, was it not?

A. I think the City of San Diego operated the Amusement Center for one year, and it proved to be a total failure as a municipal operation.

Q. A complete failure, wasn't it?

A. I would say it was a complete failure.

Q. Then Mr. Daillard came in? A. That's right.

Q. And he carried it on for the five years until Mr. Finley came in? [43]

A. I was under the impression that it was a three-year period with Mr. Daillard.

Q. How is that?

A. I was under the impression it was a three-year period with Mr. Daillard; that it was a three-year period that Mr. Daillard operated it. At least, his last lease was for a three-year period. I am quite confident of that.

Mr. Doherty: Well, we will go into that at the right time. I think that is all, Mr. Knox.

Redirect Examination

By Mr. Christensen:

Q. Mr. Knox, in addition to the military population that you have been asked about, has there been any increase in your population of the City of San Diego in recent years? A. Obviously an increase, yes, sir.

(Testimony of Harley E. Knox)

Q. As a matter of fact, there was a considerable increase, wasn't there? A. Yes, sir.

Q. There were many persons there by reason of war work? A. That's right.

Q. I am talking about civilians.

A. That is correct.

Q. Generally speaking, they were all there in 1945, too, weren't they?

A. As far as we can tell, they are all still there. [44]

Q. Mr. Knox, there is another question I wanted to ask. That is, Mr. Daillard was not the only operator of Mission Beach Amusement Center? A. Was he?

Q. There were others before him, weren't there? [45]

A. That was before my time.

Mr. Christensen: I see. All right. Thank you very much.

Recross-Examination

By Mr. Doherty:

Q. Just one question, Mr. Knox, about the people remaining there. Your principal industries have slowed down very materially during 1945, have they not?

A. That is correct.

Q. And if they stayed there, they were just either out of work or hoping to get employment?

Mr. Christensen: To which we object as calling for his conclusion or opinion.

The Court: I will let the mayor express his view on that.

A. Well, frankly, I can't give the answer to that question of where they are or what they are doing. I do know that we have about 20,000 Federally owned

(Testimony of Harley E. Knox)

housing units in the city. I know that during the war we have been able to build between nine and ten thousand. I know that we still have about the same number of applications that we had in 1944 for housing, and I know that they have discharged or terminated the employment of some 53,000 war workers. So where they are or what they are doing, I can't say, sir.

Q. By Mr. Doherty: In spite of all that, the people [46] think that San Diego is one of the finest places in the world to live, don't they?

A. Well, they know it, sir.

The Court: Mr. Mayor, I wanted to ask you just one question before you leave.

The Witness: Very well.

The Court: So that the jury can orient itself on this Pacific Square. Where is the City Hall of San Diego located?

The Witness: It is on Pacific Highway.

The Court: How far is it from this Pacific Square Dance Hall?

The Witness: Well, it is about the length of one block, sir, on the opposite side of the street.

The Court: So that is located down near the Santa Fe Railway, too, the freight house, isn't it?

The Witness: Yes, sir.

The Court: That is a new, modern, Class A structure, isn't it?

The Witness: Completed in 1939.

The Court: Housing the city officials of San Diego?

The Witness: The city and county governments.

(Testimony of Harley E. Knox)

Mr. Christensen: May I ask you, though, it is on the opposite side of that wide highway, though, isn't it?

The Witness: Yes, sir.

The Court: That is to say, the City Hall is nearer to the [47] bay front than the Pacific Square, is that right?

The Witness: Yes, sir.

The Court: Thank you, Mr. Mayor.

We will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition and keep it in terms inviolate. I wish you would occupy the jury room, ladies and gentlemen.

(Short recess.)

The Court: All present. Proceed.

Mr. Christensen: Mr. Austin, please.

DeGRAFF AUSTIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: DeGraff Austin.

Mr. Christensen: Oh, one thing. May I interrupt, your Honor? I had offered the certified copy of the bid. That is received as our Exhibit 1, is that correct?

Mr. Doherty: What is that?

Mr. Christensen: A certified copy of the bid.

Mr. Doherty: You offered it but the court sustained an objection.

The Court: That is correct.

(Testimony DeGraff Austin)

Mr. Christensen: It is not received?

The Court: I would judge so. [48]

Mr. Christensen: I offer it now, your Honor.

Mr. Doherty: The same objection.

The Court: The same ruling.

Direct Examination

By Mr. Christensen:

Q. Mr. Austin, you are a member of the County Board of Supervisors of the County of San Diego, are you not, sir? A. Yes, sir.

Q. And prior to that time, you were a member of the City Council of the City of San Diego?

A. Yes, sir.

Q. As a member of the Board of Supervisors does your district include that portion of the City of San Diego which is commonly known as the Mission Beach Amusement Center? A. No, sir.

Q. You are acquainted with it, however, are you, sir?

A. Oh, yes.

Q. And you were a member of the City Council, were you not, during the year 1944? A. Yes.

Q. And were you acquainted with the Mission Beach Amusement Center at and prior to the year 1944?

A. Yes, sir.

Q. And ever since that time? A. Yes, sir. [49]

Q. You recall, do you, the fact that an advertisement for bids was made by the City of San Diego while you were a member of the City Council in the year 1944?

A. Yes.

Q. And you remember that Mr. Daillard, Mr. Finley, and several others made bids? A. Yes, sir.

(Testimony DeGraff Austin)

Q. You recall, also, that Mr. Finley's bid did not offer as great financial return as Mr. Daillard's?

A. That is correct.

Q. And that Mr. Finley was the successful bidder—or, to put that in another way, the lease was awarded to Mr. Finley?

A. That is right.

Q. Can you tell me the reason why that was awarded to Mr. Finley?

Mr. Doherty: Just a minute. That calls for his conclusion; it is not within the issues of the case, incompetent, irrelevant and immaterial.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Well, presumably there is a record of that, Mr. Christensen. This is a body under either the Municipal Corporations Act of the state or a city charter of San Diego, which is required to keep a record of those proceedings. That [50] would show the action that was taken officially.

Mr. Christensen: I withdraw the question.

Q. Did you and the other members of the City Council and the mayor discuss and consider the various bids submitted?

A. Yes.

Q. You are familiar with the operation of Mission Beach under Mr. Daillard, are you?

A. Yes.

Q. Will you describe the operations that you observed there?

Mr. Doherty: Can this be subject, your Honor, to our running objection that it is incompetent, irrelevant and immaterial, hearsay, outside of the issues of this case?

(Testimony DeGraff Austin)

I would like to be heard just briefly—all right, your Honor, I will not argue.

The Court: I do not want any argument before the jury on questions of law unless I ask for it. It may be understood that you do interpose the objection and that the objection is overruled, without prejudice or without the court's view that it is not necessary to interpose objections *seriatim*.

Mr. Doherty: In other words, I need not repeat the objection each time to this line of testimony, but it is deemed to have been made and your Honor has overruled the objections?

The Court: That is right; the basic legal question that you raise by the objection that you have raised throughout [51] need not be repeated. That does not mean that the court is putting its approval upon the reception or the introduction of evidence that is otherwise objectionable.

Mr. Doherty: May I make one statement, not to argue? I think your Honor misunderstood one statement I made to the jury on my opening statement, which I think might be the basis of your Honor's ruling. Your Honor said in view of the statement I made to the jury that your Honor had overruled the objection.

My statement about the Daillard operation as contrary to the Finley operation was for the sole purpose of showing the financial return to Daillard and to Finley. In other words, where Daillard operated in a certain way he may have been successful, while Mr. Finley tried another plan and might have lost money, not because of any

(Testimony DeGraff Austin)

acts of defense, but because of his own inexperience or other reason that might occur.

That was what I presented to the jury only on the financial returns of Daillard as compared with Finley.

Now, I am not arguing the question. I just wanted to see if your Honor understood my position in my statement to the jury.

The Court: Proceed.

Mr. Christensen: There was a question.

(Question read by the reporter.) [52]

A. The operation was completely unsatisfactory from a standpoint of public morals. I might say that there was seldom a meeting of the City Council at which we did not have voiced an objection to the pattern of operation obtaining there. The telephone would ring constantly from outraged parents of young children in the neighborhood who took exception to the conduct of the amusement center.

We determined at the conclusion of the lease that we were either going to close it down or write a set of specifications which would be a credit to the municipality.

Q. You are familiar with the bid which Mr. Finley made, are you not? A. Yes, sir.

Q. Or proposal. Has he lived up to all of those promises? A. I would say yes.

Q. Will you describe the operation of Mission Beach Amusement Center, and particularly the ballroom, under Mr. Finley's management?

A. The place was completely renovated, a new roof put on it; it was painted inside and out, and constantly since the Finley operation there has been a force of

(Testimony DeGraff Austin)

uniformed attendants there at the expense of the concessionaire; and there has been no hard liquor permitted on the premises.

There has been a better operation all around in terms of [53] fewer arrests, fewer fights, better sanitation, better appearance of rest rooms and appearance of the dance hall. You feel now that you can permit your daughter to attend dances at Mission Beach.

Mr. Christensen: You may examine.

Cross-Examination

By Mr. Doherty:

Q. Mr. Austin, the City of San Diego has a police department? A. Yes, sir.

Q. And they are employed there to enforce the law?

A. Under the direction of the City Manager; yes, sir.

Q. And the City Council appoints the City Manager?

A. Yes, sir.

Q. And when these accusations or complaints came in that the law was being violated over at Mission Beach under Mr. Daillard's operation what did the City Council do about it?

A. We appealed to the Police Department and the Military Police to handle the situation.

Q. And did you also appeal to the City Manager that he should take care of it or you would get a new City Manager?

A. To the first part of your question, we appealed to the City Manager; yes.

Q. But you did not tell him that if he did not have [54] the law enforced that you would get a new City Manager? A. No, sir.

(Testimony DeGraff Austin)

Q. And apparently the Police Department did not pay any attention to your appeal to the City Manager, did they? The bad moral conditions continued over there?

Mr. Christensen: Just a moment. That is a compound question. Objected to on that ground.

The Court: Yes; that is compound.

Mr. Doherty: I will withdraw it.

Q. The bad moral conditions continued over at Mission Beach under Mr. Daillard after you heard these complaints? A. Yes, sir.

Q. And after you made the complaint to the City Manager, as the City Manager by the City Council, they still continued? A. Pretty largely; yes.

Q. And you made no attempt to investigate why the City Manager was not enforcing the law?

A. Why, yes; we questioned him, and on numerous occasions he laid it to the shortage of manpower within the Police Department and to the inadequacy of the Military Police.

Q. And didn't he tell you that the Military Police had charge of taking care of its own personnel?

A. I don't think that arrangement ever happened.

Q. In your experience down there you saw Military Police- [55] men around San Diego, didn't you?

A. Many times, yes.

Q. You saw Shore Policemen? A. Yes.

Q. That is, the Shore Police were in charge of the Navy personnel? A. I don't believe so.

Q. The Shore Patrol?

A. I don't believe there is any exclusive jurisdiction over military personnel by—I mean I do not believe that

(Testimony DeGraff Austin)

the Military Police handle exclusively military people, and the civilian police, civilian people.

Q. No. I am saying on the—

A. They travel, as a matter of fact, sometimes in one of the city prowl cars together.

Q. You remember of seeing along the streets of San Diego and over at Mission Beach men in Navy uniform with "S. P." on their armbands, Shore Police?

A. Oh, yes.

Q. Or Shore Patrol. Now, they enforced the law, the military law, as against the men in the Navy, didn't they?

A. And the civil law.

Q. What?

A. And the civil law as well.

Q. And you saw others in Marine uniforms and in Army [56] uniforms with "M. P." on their armbands, didn't you?

A. Oh, yes.

Q. And they enforced the law as against men in Marine uniforms and in the Army uniforms?

A. I would presume that would be very possible; yes.

Q. And you saw them over at Mission Beach, didn't you?

A. I never was able to see any of them on the occasions we attended Mission Beach in answer to, or, rather, to run down the source of these complaints.

Q. And didn't the City Manager tell you that he had appealed to the military authorities to take care of disorderly conduct by men in uniform, and that they promised they would?

A. Yes.

Q. And that is all he could do about it?

A. Well, I do not believe that is all he could have done about it.

(Testimony DeGraff Austin)

Q. You thought he could do more?

A. I believe so.

Q. But he did not do it? A. Apparently not.

Mr. Doherty: That is all.

Redirect Examination

By Mr. Christensen:

Q. The City Manager at that time was a Mr. Cooper, was [57] it not?

A. Yes. We felt we had a splendid manager.

Q. He is now dead, isn't he? A. Yes, sir.

Mr. Christensen: Thank you.

The Court: That is all, Mr. Austin.

Mr. Christensen: Mr. Crary, please.

GERALD C. CRARY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Gerald C. Crary, C-r-a-r-y.

Direct Examination

By Mr. Christensen:

Q. Mr. Crary—

The Court: Just a moment, Mr. Christensen. I want to tell the jury that we have official reporters here in the courtroom and that they shall not make any notes of the testimony, the jury shall not make any notes.

Proceed.

Mr. Christensen: The question I commenced, I withdraw.

(Testimony of Gerald C. Crary)

Q. Mr. Crary, you reside in the City of La Jolla—or, pardon me, that portion of the City of San Diego commonly known as La Jolla? A. Yes, sir. [58]

Q. And you are in business there? A. Yes, sir.

Q. What is your business?

A. Laundry and dry cleaning.

Q. La Jolla is just a few miles from Mission Beach, is it not? A. About six.

Q. What is the name of your laundry there and dry cleaning place? A. Cleancraft.

Q. Pardon? A. Cleancraft.

Q. And, in addition to that, you are a member of the City Council of the City of San Diego, are you not, sir?

A. Yes, sir.

Q. You have been a member there now about three years, as I remember it; is that right?

A. A little over two years.

Q. A little over two. And you were a member of the City Council at the time—

A. A little less than two years. I beg your pardon.

Q. You were a member of the City Council at the time this bid was made by Mr. Finley? A. Yes, sir.

Q. Were you familiar with Mission Beach Amusement Center [59] prior to that time? A. Yes, sir.

Q. Visited there? A. I lived there.

Q. You lived right there?

A. Previous to living in La Jolla I lived in Mission Beach.

Q. You represent that portion of the City of San Diego in the council, do you not, sir? A. Yes, sir.

(Testimony of Gerald C. Crary)

Q. Then, is it a correct statement that you are familiar with Mission Beach and Mission Beach Amusement Center; is that right? A. Yes, sir.

Q. Were you familiar with its operations under Wayne Daillard? A. Yes, sir.

Q. Describe them to the jury.

A. I think it has been quite clearly given. The liquor condition was very bad. The condition of cleanliness and policing was very poor. The moral situation, from the standpoint of the neighborhood or people who owned homes adjacent to the Amusement Center, there was much objection by those people due to the carryings-on at the Center.

Q. Do you remember the promises made in the bids [60] submitted by Mr. Finley? A. Yes, sir.

Q. Has he lived up to those? A. Yes, sir.

Q. Describe the operations under Mr. Finley.

A. Well, one of the requisites in the bid was particularly on the part of servicemen to keep from overcharges, to keep the Center on the basis of giving honest values and giving a real place for not only the servicemen, but their friends, their women friends and family amusements.

The cooperation from the standpoint of the various organizations such as the P.T.A. and the Boy Scouts and the various Center organizations in coordinating councils has been very fine under Mr. Finley's regime.

Q. Has he established at his own expense a police force there? A. He has.

Q. A private police force, of course. Do you know whether or not he has made any improvements or alterations to the ballroom? A. Considerably.

(Testimony of Gerald C. Crary)

Q. Briefly describe them.

A. Well, it was renovated completely inside, and must have been done by an interior decorator who knew what they were doing. [61]

Q. The sound equipment, do you know that that was changed?

A. A very decided improvement. It was either changed or fixed.

Q. And the rest of the park, too, was it improved?

A. Very much.

Q. Repainted, among other things? A. Yes, sir.

Q. Prior to the time Mr. Finley had the Mission Beach did the City Council—were 'teen-agers permitted to attend the dances there?

A. No, sir; I don't believe so, that is, there were few parents who would let their children go there.

Q. What is the situation now?

A. There have been a number of 'teen-age dances given, and very successfully.

Mr. Christensen: You may examine, counsel.

Cross-Examination

By Mr. Doherty:

Q. Mr. Crary, you state that Mr. Finley made a substantial improvement at the Mission Beach in the way of changing structures, etc.?

A. (Witness nodding.)

Q. And was your answer "yes"? A. Yes, sir. [62]

Q. And he paid for those himself, did he?

(Testimony of Gerald C. Crary)

A. Not all. There were some improvements that the city made at their expense.

Q. The city made some improvements?

A. The city made some improvements.

Q. Yes.

A. But the improvements along what we would call the main way were all done at Mr. Finley's expense; the interior improvements were all at his expense. I might just add that, as I remember—I do not remember the contract in detail—but the painting, we painted the outside of the ballroom because we wanted it painted when we got it back, and this stipulated in the contract that it would have to be painted each year.

Q. Yes.

A. And it was also stipulated it was to be returned in a certain condition so far as the exterior was concerned.

Q. He just got a short-time lease there, didn't he?

A. Three years.

Q. He has a much heavier overhead than Mr. Daillard had, does he not, in the way of personnel, you say, guards and others around there?

A. He is running a much more satisfactory operation, more personnel, but as a result, getting a great many more people. [63]

Q. In other words, he has a great number more of people employed than Mr. Daillard had?

A. (Witness nodding.)

Q. Your answer is "yes"?

A. Yes, sir.

(Testimony of Gerald C. Crary)

Q. And he has charged—

A. I don't know that a great many, but I would imagine more. He has police.

Q. He has more personnel there than Mr. Daillard had?

The reporter, Mr. Crary, can't get your affirmative nods. I mean this gentleman here is taking all of this down and you must answer audibly. A. I see.

Q. And your answer was "yes"? A. Yes.

Q. And he has, generally, more personnel employed about the ballroom, also, than Mr. Daillard had?

A. Some, yes.

Q. Mission Beach is sort of a dual operation; one is the ballroom which was operated by Mr. Daillard, and then outside of the ballroom were these so-called concessions of various types, is that correct? A. Yes.

Q. And that is true also with Mr. Finley?

A. Yes. [64]

Q. And Mr. Finley charges much less in the way of admissions than did Mr. Daillard, I believe; that is correct, isn't it? A. Yes.

Q. And Mr. Finley also has reduced the price of concessions much below what Mr. Daillard was charging?

Mr. Christensen: To which we object as not being intelligible, "the concessions".

The Court: Read it, Mr. Reporter. I thought it was clear.

(Question read by the reporter.)

Mr. Doherty: By the "concessions" I mean what the concessionaires sell to the public.

(Testimony of Gerald C. Crary)

The Court: Well, I really do not understand it myself now.

Mr. Doherty: I will withdraw the question.

Q. Mr. Daillard's concessionaires sold soft drinks, sandwiches, and they had these dart games and other things of that sort, is that correct? A. Yes, sir.

Q. And the prices charged by Mr. Daillard for those activities—when I say “Mr. Daillard” I mean his concessionaires—was a greater price than charged by Mr. Finley? A. Much higher.

Q. Yes. And inside the ballroom the admission charged [65] by Mr. Finley for getting into the ballroom, per couple, was much below what Mr. Daillard had charged? A. I am not sure of that.

Mr. Christensen: Just a minute. That is objected to as calling for a conclusion or opinion, and the words “much below” particularly I am directing my attention to.

Mr. Doherty: I will withdraw it and get over that.

Q. The charge made by Mr. Finley for admission to the ballroom was less than was being charged by Mr. Daillard for the same admission? A. In some cases.

Q. How is that? A. In some cases.

Q. Well, did not Mr. Finley reduce the admission to the ballroom to 49 cents per person?

A. I am not fully acquainted with all the prices on the ballroom. I know that he put on special nights for military, when he turned it over completely to them at special prices, and did things that we had requested that they do in the contract.

Q. But what you do know about it is that Mr. Finley's prices were less than those being charged by Mr. Daillard? A. Yes.

(Testimony of Gerald C. Crary)

Q. Did you receive the call respecting excessive drinking by ex-servicemen over on Mission Beach by one of the [66] councilmen? A. Yes, sir.

Q. Did you take that up with the City Manager?

A. Yes, sir.

Q. And you told him you were receiving these calls?

A. Yes, sir.

Q. And the City Manager was in charge of the Police Department, was he not? A. Yes, sir.

Q. And did he tell you that the military were in charge of maintaining order among men in uniform; that that was their job?

A. Probably words to that effect.

Mr. Doherty: Yes. That is all.

Redirect Examination

By Mr. Christensen:

Q. And since Mr. Finley has been there, though, his guards have taken care of that to the end that there is now no rowdyism?

A. A tremendous improvement; in fact, I haven't had a single call this past year on the policing condition at Mission Beach.

Q. Do you know that as a matter of fact the revenue derived from the concessions, exclusive of the ballroom, has been approximately three times as much as that derived by Mr. [67] Daillard through his operation of those concessions?

Mr. Doherty: I object on the ground there is no foundation laid that this witness has knowledge of that.

(Testimony of Gerald C. Crary)

The Court: Well, it can be answered yes or no. Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: That can be answered yes or no.

Mr. Doherty: May I further object, your Honor, that he does not indicate revenue of whom—by Mr. Finley or by the city? It is indefinite on that ground.

The Witness: I can't answer it yes or no, Judge.

The Court: He says he can't answer it yes or no, so you will have to propound another question.

Q. By Mr. Christensen: Mr. Crary, the terms of the lease require Mr. Finley to pay two per cent of the gross receipts derived by him from the concessionaires, doesn't it? A. That is right.

Q. And upon that basis, keeping those two per cent in mind, have the returns made by Mr. Finley been less or greater than that by Mr. Daillard?

Mr. Doherty: That is objected to as incompetent, and immaterial, without the issues of this case.

The Court: Overruled. A. Greater.

Q. By Mr. Christensen: Can you tell me how much greater? [68]

A. I haven't seen the figures for the last four months.

Q. Prior to that what did it amount to?

A. Over double.

Q. Mr. Crary, another question: During the year 1945 were there more or less people at the beach than in the year 1944? A. More, in my opinion.

Mr. Christensen: Thank you, sir.

Mr. Doherty: Is that all?

Mr. Christensen: That is all, Mr. Doherty.

(Testimony of Gerald C. Crary)

Recross-Examination

By Mr. Doherty:

Q. In other words, Mr. Finley was successful in having more people go out to the Mission Beach Ballroom and Mission Beach area than Mr. Daillard had been able to induce to go there?

Mr. Christensen: To which we object as compound, because it includes both the ballroom and the amusement center, whereas my question was directed solely to the beach, Mission Beach Amusement Center.

Mr. Doherty: Well, I will withdraw that and see if I can get at it with this witness.

Q. The Mission Beach is a piece of land upon which is located some concessions, an amusement park of which a portion is a ballroom, is that right? [69]

A. Yes, sir.

Q. And when you say that there were more people went out to Mission Beach under Mr. Finley than when Mr. Daillard had it, you mean, do you not, that there were more people in the entire entertainment area, including the ballroom? A. Yes, sir.

Q. Have you got the same City Manager there you had during Mr. Daillard's operation? A. No, sir.

Mr. Doherty: That is all.

Q. By Mr. Christensen: He is Mr. Cooper, who is now dead, isn't he? A. That is right.

Mr. Christensen: Thank you, that is all. You may step down, please.

Mr. Leo Calland, please.

LEO B. CALLAND,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Leo B. Calland, C-a-l-l-a-n-d.

Direct Examination

By Mr. Christensen:

Q. Mr. Calland, your business, occupation or profession, sir, is what? [70]

A. At the present time, assistant to the City Manager for recreation, City of San Diego.

Q. And immediately prior to that what was your business or occupation?

A. I was director of welfare and District Recreational Officer for the 11th Naval District.

Q. With the rank of what, sir?

A. Lieutenant Commander.

Q. For what period of time were you so engaged?

A. From June, 1942 to June, 1945.

Q. What were your duties as such?

A. I was on the Headquarters Staff of the Commandant. I was directly in charge of all welfare and recreational functions of the 11th Naval District.

Q. And almost immediately upon your discharge, you went to work for the City of San Diego?

A. Yes, sir.

Q. What are your duties now as assistant to the City Manager of the City of San Diego in charge of welfare and recreation?

A. Playground and recreation department, and the school recreation are directly under me. I represent the

(Testimony of Leo B. Calland)

City Manager in all other phases of recreation in other city departments.

Q. While you were director of welfare and recreation for the 11th Naval District—the 11th Naval District, by the way, Mr. Calland, will you describe it to us? [71]

A. It is most of Southern California; extends from the Mexican border to Lompoc, and includes all of Arizona and New Mexico.

Q. While you were the director of recreation and welfare for the 11th Naval District did you become acquainted with the Mission Beach Amusement Center?

A. Yes, sir.

Q. And when did you become acquainted with it?

A. Immediately.

Q. One of the first things? A. Yes, sir.

Q. What was it that attracted your attention to it?

A. First of all, we had to make a survey of facilities available to servicemen on liberty and leave in the district; and in San Diego, the Mission Beach amusement zone at that time was one of the largest ones in operation. [72]

Q. And what did you find upon your inspection of Mission Beach?

Mr. Doherty: It is understood that is subject to our standing objection?

The Court: That is a pretty broad question there. I think I will sustain the objection.

Mr. Christensen: Let me withdraw it.

Q. By Mr. Christensen: Did you observe the conditions prevailing there, sir? A. Yes, sir.

Q. Will you describe them?

Mr. Doherty: Subject to our same objection, your Honor.

(Testimony of Leo B. Calland)

The Court: The same ruling. You may answer.

Q. By Mr. Christensen: Go ahead, sir, just tell these ladies and gentlemen what you saw there, what you found there?

A. Well, first of all, it was what is known as a gyp joint.

Mr. Doherty: That is a conclusion of the witness and I move it be stricken as prejudicial.

The Court: Yes. I don't know as that has any meaning in the nomenclature of the Federal Court. It may have, but elucidate that in our parlance, will you?

The Witness: Well, in other words, they charged the servicemen everything the traffic would bear, gave him as little service as possible, pushed him around, and I made [73] recommendations to the Shore Patrol that something be done about it, and it was found that we didn't have enough Shore Patrol available in San Diego to properly police the area, due to the number of places that were in operation that did not conform with decent conduct. To help the situation out, we took out part of our Navy bath house in Mission Beach and made a brig out of it.

Q. By Mr. Christensen: A brig is a jail in the Navy language?

A. A brig is a jail, and it would fill up so fast, it wasn't a solution to the problem.

Q. Was there any change since Mr. Finley took it over?

A. Mr. Finley took over in the last six months of my duty in the Navy, and during that time there was a great change in the operation.

(Testimony of Leo B. Calland)

Q. Describe the change.

A. We no longer needed the brig, for one thing. There was no liquor sold. The Shore Patrol were able to adequately—in spite of the lack of numbers—were adequately able to take care of the crowd, which was larger.

Q. Prior to the time Mr. Finley took over Mission Beach Amusement Center, was there any recommendation by your office, as director there, in favor of Mission Beach Amusement Center?

Mr. Doherty: That would be hearsay, and incompetent, irrelevant and immaterial. [74]

The Court: Overruled.

The Witness: A. It was suggested to the Shore Patrol, and discussed at great lengths, whether we would place Mission Beach out of bounds. It was decided we should not do it because there was really no other place for the servicemen to go.

Q. By Mr. Christensen: What was your recommendation after Mr. Finley got in operation there?

A. We had no recommendation. There was no difficulty.

Q. Now, since that time, as assistant to the City Manager of San Diego, in charge of welfare, you had some experience with Mission Beach Amusement Center, in general, and the Mission Beach Ballroom in particular, did you not, sir?

A. Not in an official capacity until just in the last few weeks.

(Testimony of Leo B. Calland)

Q. What, if anything, is the City of San Diego doing there now?

A. We are planning to run community dances starting the Friday—on Friday night, February 8th, and in which the recreation department will cooperate with Mr. Finley in conducting the dances.

Q. And have you been having teen-age dances there since Mr. Finley's operation?

A. Before I came to the city, they did.

Q. While you were still in the Navy? [75]

A. While I was still in the Navy.

Q. And that is still going on?

A. Those dances I am speaking of are to take the place of the teen-age dances we had before.

Q. During the time that Mr. Finley has had the ballroom, has he provided any facilities of entertainment for the servicemen of the Eleventh Naval District, to your knowledge?

A. Yes, sir.

Q. Can you tell us what?

A. Immediately after Mr. Finley took over the ballroom, I contacted him to find out what type of operation he was going to conduct, and when I saw the plans that he had, we immediately made arrangements to conduct a service dance on Tuesday nights during the winter and Monday nights during the summer, to which there would be no charge for the ballroom. My office was to supply the music.

Q. The Navy Band?

A. The Navy bands, and when we couldn't get bands, I will say that Mr. Finley provided us with the bands.

(Testimony of Leo B. Calland)

One of the Navy stations would take over the operation of the dance, the conduct of the dance.

Q. Did Mr. Daillard cooperate like that with you?

A. No, sir.

Q. In addition to those things, you have mentioned, [76] did Mr. Finley put on any shows for the personnel of the Eleventh Naval District? A. Yes, sir.

Q. Tell the ladies and gentlemen about that.

A. Prior to Mr. Finley coming into San Diego, we were never able to get bands that played at Pacific Square or Mission Beach Ballroom to entertain at the hospital and the other stations in the area. When Mr. Finley took over Mission Beach Ballroom, we scheduled every week one of his bands to entertain the service personnel, and usually one of their engagements would be at the hospital.

Q. Well, how much did he charge you for doing that?

A. Free.

Q. Have you had any occasion to observe the effect, whether that would cause more people to attend the dance, or fewer,—the activities you have just described of Mr. Finley?

A. I believe it increases the attendance.

Q. What is the reason for your opinion on that?

A. Just prior to Mr. Finley taking over Mission Beach Ballroom, Lyle Thayer of M.C.A. called me up and requested me to book Freddy Martin for a couple of engagements, because he was coming to San Diego to play at Mission Beach, and after Martin made these appearances at the Naval Station he outdrew the name band that was playing at Pacific Square. [77]

(Testimony of Leo B. Calland)

Q. That was Paul Martin, wasn't it?

A. No, it was Freddy Martin.

Mr. Christensen: You may examine, counsel.

Cross-Examination

By Mr. Doherty:

Q. I am going to call you Mr. Calland, Commander. You had charge of the entire Eleventh Naval District?

A. Yes, sir.

Q. How often did you go out to Mission Beach?

A. I made at least 50 personal inspections of Mission Beach during my tour there, because we had a Navy bath house, and a number of other operations, in addition to our general activities, in connection with the amusement zone.

Q. During the time that Mr. Daillard was operating there, was that the time that the new men were coming in and going overseas, primarily?

A. Well, I don't know where they were going or coming from, but they were coming in both directions most of the time.

Q. Weren't there more men headed out across the Pacific in that period?

A. The majority were going out, yes.

Q. And in 1945 the majority of them were heading back; is that right?

A. Yes, sir. [78]

Q. Have you noticed any difference in the attitude of the boys, as between those that were going over and those that were coming back, as regards their being more seasoned and level-headed on their return than when they were going out?

A. I am afraid you opened up on that, sir.

(Testimony of Leo B. Calland)

Q. How is that?

A. I am afraid you opened up on that, sir, because I conducted 70 dances a month at Navy Athletic Field, which is a Navy institution, and I found we had a great deal more trouble in handling the men coming back from overseas, and from ships, than we did with recruits.

Q. I am not speaking of the men that were coming off of the ships and going back out again. I mean the veterans.

A. The veterans, I am speaking of.

Q. Didn't you find the veterans were not inclined to spend as much money as those on the way out?

A. No, sir.

Q. You found the veterans spent more money?

A. Yes, sir.

Q. You saw that the attendance at Mission Beach during 1945 under Mr. Finley was more than under Mr. Daillard's operation?

A. On the total beach operation, yes, sir.

Q. But you think that is attributable to the fact that [79] Mr. Finley in his public relations took a different viewpoint from Mr. Daillard in that he appealed to matters of public interest more?

A. That is a matter of opinion, but I believe that the type of operation he conducted attracts more people than it did before.

Q. And you attribute the large attendance there, in part at least, to Mr. Finley's public relations approach as being better than that of Mr. Daillard's?

A. Yes, sir.

(Testimony of Leo B. Calland)

Q. You, of course, are not familiar with the prices that were being charged by Mr. Daillard at the dance hall, as compared with what Mr. Finley charged?

A. The prices varied at the dance hall according to the band that is playing. A name band has a larger admission price than a house band or B-bands.

Q. In other words, Mr. Finley charges more for a name band than he does for the house band?

A. Yes, sir.

Q. And you observed that, did you? A. Yes, sir.

Q. You saw Mr. Finley having name bands there, did you? A. He has an occasional name band.

Q. Yes. And at other times he had house bands?

A. Yes, sir. [80]

Q. At other times he had other forms of entertainment? A. Yes, sir.

Q. What did he charge for the house band, do you know, for admission to the dance hall?

A. The lowest price that I have noticed was 49 cents, plus tax, for an individual.

Q. And Mr. Daillard charged more than that, didn't he? A. Mr. Daillard doesn't play this type of band.

Q. Well, I am asking you if the admission at Mr. Daillard's operation wasn't more than 49 cents?

A. Yes, sir.

Q. Now, when Mr. Finley had name bands there, what did he charge per individual for admission to the dance hall?

A. I am not exactly familiar with that, because it will vary with almost each appearance.

Q. Yes. You didn't keep a record of the name bands that Mr. Finley had there? A. No, sir.

(Testimony of Leo B. Calland)

Q. You noticed while Mr. Daillard was there that he had a lot of western bands? A. Yes, sir.

Q. And Mr. Finley didn't go very much for western bands? A. Yes, sir.

Q. He had a different type of entertainment? [81]

A. He had a much better type of entertainment.

Q. Well, judging by the crowd, the attendance, I would say you are correct. In other words, he was successful in getting more people to go out to Mission Beach by his type of entertainment than what Mr. Daillard was able to get to go there?

A. Well, the crowd that went to the western bands was very rowdy and drunken.

Q. But not as large a crowd as Mr. Finley has been able to bring there?

A. I believe Bob Wills Western Band drew the largest crowd in Mission Beach Ballroom, and that was by Mr. Daillard, and it was a western band.

Q. That is just one band?

A. It is the Bob Wills band. It is one of the typical western bands, probably the best one we have had in San Diego.

Q. And that was a western band? A. Yes.

Q. But Mr. Finley was successful in getting more people to go out to the Mission Beach under his type of bands than Mr. Daillard was, with the exception of the Bob Wills band?

A. No, sir. I said more people attended the beach, but not the ballroom.

Q. More people attended the beach?

A. The beach, the amusement zone covers several blocks, [82] and I do not have the figures on the

(Testimony of Leo B. Calland)

ballroom, but I do know that more people are on the streets and at the beach under Mr. Finley than under Mr. Daillard.

Q. Yes. In other words, there has been a greater crowd into the park, generally, and into the Amusement Center than there was while Mr. Daillard had it?

A. Yes, sir.

Q. You made no effort to find out the comparative figures on the ballroom, did you? A. No, sir.

Q. Now, respecting the drinking among the servicemen, a lot of them had their own bottles, didn't they?

A. Yes, sir.

Q. And could they buy bottled goods on the recreation center? A. Yes, sir.

Q. There was a concession there for that, was there?

A. Yes, sir.

Q. And that concession was discontinued by the City Council under the new contract with Mr. Finley?

A. Yes, sir.

Q. Under the concession Mr. Daillard had, he was permitted to have a bar? A. Yes, sir.

Q. And under Mr. Finley's contract with the city, that [83] bar was discontinued?

A. Except for beer.

Q. Except for beer. And that was sold there, was it, while there were teen-aged children attending the dances? A. No, sir, not in the ballroom.

Q. They sold beer around the recreation center, though? A. That's right.

(Testimony of Leo B. Calland)

Q. Don't you attribute the fact that there was more intoxication among the ex-servicemen to the fact that those concessions did sell liquor than to any other cause?

A. Probably, but I couldn't—they carry a lot of liquor around over town, too.

Q. You have more Shore Patrol men now per man than you did in 1942, '43 and '44, do you not?

A. No, sir, the Shore Patrol are being cut down. I believe the largest figure we had on the Shore Patrol in San Diego, and I am not exactly qualified to speak, except from my memory, was around 400 Shore Patrol men that were allowed for the San Diego area.

Q. But your service personnel has gone down, has it not?

A. And the Shore Patrol has been likewise cut down.

Q. And the number of Marines and soldiers there are far less than they used to be?

A. Yes. [84]

Q. And, of course, they have reduced their military police force?

A. That's right.

Q. Did the city during the great increase in population increase its police force?

A. They were not able to do so.

Q. They did not do so?

A. They could not. Men were not available.

Q. Wasn't there an understanding between the military, and by the military I mean the Naval, as well as the Army and Marine Corps, that the military uniformed officers would handle the servicemen in uniform, and the civilian police would generally leave them alone?

A. That was a gentlemen's agreement, I believe, between the men on duty. However, a policeman had

(Testimony of Leo B. Calland)

authority over service personnel, and the Shore Patrol had authority over civilians, over a civilian's rights.

Q. But by a gentlemen's agreement they separated their duties?

A. Whenever possible they would have Navy Shore Patrol take care of Navy and Marine personnel, and the Army take care of the Army.

Q. Yes.

Q. However, the city police had full authority over the service personnel also. But it was a matter of [85] eliminating as much friction as possible between the police and the Shore Patrol, so that they usually went in pairs, and the Navy would take care of the military personnel, and the police would take care of civilians.

Q. Oh, yes. We understand that because a man is in uniform, he is still an American citizen and is subject to the civil law.

A. Yes, sir.

Q. But by reason of an arrangement so as to reduce friction you let each uniformed group handle its own personnel?

A. I believe the men worked that out among themselves rather than by any directive from the top.

Mr. Doherty: That is all, Lieutenant, or, rather, Commander.

The Court: If you are going into it further, we will have it in the morning.

Mr. Christensen: Might I ask just one question, and he can be excused. He wanted to get away today.

(Testimony of Leo B. Calland)

Redirect Examination

By Mr. Christensen:

Q. Is it true between, let us say, the 1st of January, 1945, and VJ-Day that there were more or less members of the Armed Forces in the City of San Diego than there were in the preceding year? [86]

A. I could not give exact figures on that because in San Diego we were just so crowded all the time we never tried to count them.

Mr. Christensen: That is all.

The Court: Ladies and gentlemen, we will take a recess until 10:00 o'clock tomorrow morning. Remember the admonition and keep its terms inviolate.

(Whereupon, at 4:40 o'clock p. m. an adjournment was taken until 10:00 o'clock a. m., January 30, 1946.) [87]

Los Angeles, California, Wednesday, January 30, 1946,
10:00 a. m.

The Court: All present. Proceed, gentlemen.

Mr. Doherty: If the court please, may I ask counsel for plaintiff a question, upon what theory he is offering testimony by public officials and others as to the drinking conditions and other conditions which they have testified to as existing at Mission Beach under the management of Mr. Daillard and the comparative conditions existing there under Mr. Finley?

The Court: Yes, sir.

Mr. Christensen: Yes, your Honor; I will be glad to answer the question.

The evidence has, at least inferentially, and will show that Mr. Daillard had a contract with Music Corporation of America for a period of several years—I think since November, 1941—by the terms of which M.C.A. furnished name bands to Wayne Daillard for his use at the Mission Beach ballroom.

That the Mission Beach ballroom and the Mission Beach Amusement Center, in general, are operated, managed and conducted in such a manner and maintained in such a condition that it would appeal only to the rowdy element at the best; that the conditions were so bad that the city officials became alarmed; that the Navy became alarmed; that the bid was [89] let to Mr. Finley.

Mr. Finley made extensive alterations, modernizations and improvements to the Mission Beach Amusement Center, in general, and to the ballroom in particular; and that he has maintained it ever since that time in such a condition and in such a manner that it appeals to and is frequented by the better element of the City of San Diego.

That, as a matter of fact, there are more people now there than there were before; that it is recommended now by the welfare organizations; and that during the operations of Mr. Daillard it was on a more or less haphazard basis, but notwithstanding those facts, Mr. Daillard was able to make money in the operation of the Mission Beach ballroom and that that is attributable to the fact that name bands were furnished by M.C.A. to Wayne Daillard; and that it is a condition precedent to the successful operation of a first-class ballroom that name bands be used and employed.

Mr. Doherty: Then, it is solely for the purpose of showing the damages in the way of the loss of profits that Mr. Finley has suffered at Mission Beach that this testimony is being introduced?

Mr. Christensen: I think I would like to stand on my statement that I have made, unless it is ambiguous to you, Mr. Doherty.

Mr. Doherty: Well, it only goes to the element of the damages; it does not involve any matter of the interstate [90] commerce or monopoly or restraint of trade. In other words, you do not contend that these conditions that existed at Mission Beach, as claimed by these witnesses, was in restraint of trade or monopoly, or for any other purpose and act of interstate commerce, but solely for the purpose of determining what the damages were, suffered by Mr. Finley?

Mr. Christensen: We do not contend that the evidence so far shows, nor that such evidence would show the interstate character of the business, nor that it would show a restraint of trade.

Does that answer your question, Mr. Doherty?

Mr. Doherty: Well, can you go one step further and say it is solely for the purpose of a basis of introducing further evidence to show the damages suffered or claimed by Mr. Finley?

Mr. Christensen: I think it is one of the elements that goes to show that. [91]

The Court: Very well. You understand, ladies and gentlemen, where there is an agreement between counsel before you in the form of a stipulation, that is what it is called in the court room, it means an agreement between counsel, and you are to accept that agreement without any further evidence on it. You have heard what the agreement is, and you must accept it for what it is worth.

Mr. Doherty: I don't want it understood, your Honor, that we have agreed to his theory. I have asked him to state his theory so that I may be more intelligible in my objections. I have heretofore objected to this line of testimony offered on the ground it is hearsay, incompetent, irrelevant and immaterial, and not within the issues of the case, and I want to add to that also—I have added that there was no foundation laid, that there was no promise to connect it up with any combination or other alleged act in the pleadings, and I want to add to that now that the basis of it so far as damages are concerned is entirely speculative, and that it is not a basis for evidence to be introduced on those issues.

I am not agreeing to his theory. I am merely trying to ascertain what it is, and I am vigorously and will vigorously oppose it, as I do not think it is within the issues of the case for the reasons that I have already indicated.

The Court: Very well. Proceed. Call the next witness.

Mr. Christensen: Bruce Weston, will you come forward, please? [92]

BRUCE WESTON,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Bruce Weston.

By Mr. Christensen:

Q. Mr. Weston, your business, occupation or profession, sir, is what?

A. Lieutenant of police, San Diego.

Q. Do you have a definite station or area of which you are in charge?

A. I do. I have charge of the beach areas, all the beaches.

Q. That includes, I take it, from La Jolla to and including Mission Beach?

A. Yes, sir, from La Jolla to Fort Rosecrans, which is south of Mission Beach.

Q. Very well. For what period have you been so employed, sir?

A. Three years in that area.

Q. You have been employed in the police department of the City of San Diego for what period, sir?

A. Eighteen years.

Q. Are you familiar with the Mission Beach Amusement [93] Center in San Diego?

A. Yes, sir.

Q. And with the ballroom?

A. Yes, sir.

Q. Are you familiar with the conditions prevailing there prior to the time Mr. Finley got the lease?

A. Yes, a short time.

(Testimony of Bruce Weston)

Q. During that period of time will you describe the conditions as you observed them.

Mr. Doherty: May it be understood, your Honor, that this testimony is offered over the objection I have just made recently, and have made previously, without repeating specifically what the objection is?

The Court: It may be so understood, and the objection is overruled as heretofore stated in the record.

The Witness: May I have the question again?

The Court: Read it, please.

(The question was read.)

Mr. Doherty: That is prior to the time Mr. Finley took over, as I understand?

Mr. Christensen: Yes, I mean immediately prior thereto and during the time Mr. Daillard was operating the Amusement Center.

The Witness: A. Well, I don't know just how to answer it, just what you mean. [94]

Q. By Mr. Christensen: Describe it in your own way, and in your own words, if you will.

A. Well, the beach area, the Mission Beach area, takes in the dance hall, skating rink, all the Amusement Center. I hardly know just what to state other than that was over a year, or a year and a half ago, fifteen months ago. I can put it this way, if I may, that when Mr. Finley's organization took over, as far as police observation was concerned, my duties there, there seemed to be a definite improvement in the operation of the concessions; I mean in the orderliness, and the dance hall, and cooperation from the management with the police. That is about the best I can state it.

(Testimony of Bruce Weston)

Q. Are there any police problems there now or at any time during Mr. Finley's operation?

A. No, since Mr. Finley has been there, there has been 100 per cent cooperation by the management with the police. Any suggestion for betterment that I would make, and when I say "I" or "we" I mean the police, was adopted immediately.

Q. The place is now orderly, is it?

A. Fine, first-class, yes, sir.

Mr. Christensen: Thank you. You may examine, Mr. Doherty. [95]

Cross-Examination

By Mr. Doherty:

Q. Mr. Weston, you were in that area during most of the war period?

A. Well, most of the war period, yes.

Q. And during the so-called war period there was a great influx into San Diego of defense workers, was there not?

A. Yes, sir.

Q. Also, there were great crowds of people who came in, relatives and friends of servicemen who were stationed there and were being shipped out?

A. Yes, the city was very crowded with every sort of people, I would say.

Q. You might say there were three general types that were there during this period to which we are referring that were not there before the war or the preparation for the war, and I am going back now to early 1941: one is the great increase in the number of men in uniform over normal times?

A. Yes, sir.

(Testimony of Bruce Weston)

Q. And there was a great increase in the number of defense workers who had come from outside communities into San Diego? A. Yes, sir.

Q. And there was a great increase in the number of friends and relatives, and others, who came there to visit the [96] men in uniform and also to visit the defense workers, who had come there from outside of the city or out of the state? A. Without a doubt, yes, sir.

Q. I mean, you observed that, did you not?

A. Yes.

Q. Did you notice that during that period, '41, '42, '3 and '4, there was a noticeable increase in the consumption of intoxicating liquors by that group over what had happened or existed prior to that time?

A. Well, I cannot answer it according to that group. I don't like to use that term. I would say there is no difference in groups. There is just more of everybody, and early in the war I was a jailer, and I particularly noticed much more drinking results.

Q. There was a general breaking down of standards all the way along the line by every one, as you observed?

A. Seemingly so.

Q. In other words, drinking on streets, and people going along on the public streets with bottles of liquor in their hands, that did not exist, as you observed, in peacetime?

A. Well, I think that is general everywhere. That is just a thought there.

Q. In other words, the police problems in San Diego were much more difficult during this period than they were in peacetimes? [97] A. Yes, sir.

(Testimony of Bruce Weston)

Q. And that was of all types of police work, particularly fights and disorderly conduct, and heavy drinking, and association between boys and girls, and men and women, and things of that sort? A. Yes, sir.

Q. That made your problem much heavier in those years than had existed prior to that time?

A. Yes, sir.

Mr. Doherty: I think that is all.

Redirect Examination

By Mr. Christensen:

Q. That condition continued to prevail until VJ-Day, didn't it? A. Around the city in particular, yes.

Q. As a matter of fact, it still continues, does it not, sir? A. Yes, sir.

Q. So that the condition was the same on January the 4th, of 1945, as it was during all of 1944, wasn't it?

A. You are speaking now of the city in general, or just Mission Beach?

Q. No, I am speaking of the city in general.

A. Yes, pretty much so; very little difference as yet. The city is crowded yet. [98]

Mr. Christensen: That is all.

Recross-Examination

By Mr. Doherty:

Q. I forgot to ask one question. Who was the manager under Mr. Finley during the early part of 1945, if you know? A. Mr. Birdell.

Q. Was there a Mr. Mulligan also there, or did you know him?

A. I knew a Mr. Mulligan, yes. He worked under Birdell.

(Testimony of Bruce Weston)

Q. Pardon me?

A. He worked under Birdell, I believe. Birdell was Mr. Finley's manager.

Q. Yes, he worked under Mr. Finley's manager?

A. Yes.

Q. Was Mr. Mulligan there also under Mr. Daillard?

A. That I do not remember, or know. I never knew Mr. Daillard.

Q. You never met Mr. Daillard? A. No, sir.

Mr. Doherty: That is all.

The Court: Thank you. You may step down.

Mr. Jaffe: Joseph Zucca, please. [99]

JOSEPH ZUCCA,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Joseph Zucca.

The Clerk: Z-u-c-c-a?

The Witness: That's right.

By Mr. Jaffe:

Q. Mr. Zucca, your business or profession is what?

A. Managing director of the Meadowbrook at Culver City.

Q. That is a ballroom, a first-class ballroom in Culver City? A. That's right.

Q. How long have you been so engaged, sir?

A. About seven years. [100]

(Testimony of Joseph Zucca)

Q. In your business as the operator of the ballroom in Culver City have you heard the expression used "name bands"?

A. I did.

Q. What is your definition of a name band?

Mr. Doherty: I object to it as incompetent, irrelevant and immaterial; no foundation laid.

The Court: I presume if it is a matter of technical knowledge, that there should be some qualifications other than the mere fact that he is conducting a ballroom. Objection sustained to the question as it was propounded.

Q. By Mr. Jaffe: Prior to your occupation as manager of the Meadow Park ballroom what was your occupation, sir?

A. Up to six months ago I was the owner, and six months hence I have incorporated and am now secretary-treasurer and manager.

Q. Have you ever bought bands? A. Yes.

Q. Have you ever booked bands? A. Yes.

Q. Do you know what bands are? A. Yes.

Q. Do you know the term or expression "name band"? A. Yes.

Q. What would you define the term "name band"?
[101]

A. In my particular case, I believe a name band is a person who has organized a group of musicians and in a manner that, through radio and recording transcriptions, has become nationally known.

Q. The band is accepted nationally? A. Yes.

Q. That it enjoys its national reputation through the medium of recordings, through the medium of radio, that it is a boxoffice attraction?

A. Yes; it is a boxoffice attraction.

(Testimony of Joseph Zucca)

The Court: Just a minute. Suppose you ask him, instead of stating it and then asking him to approve it, so that then the court will know exactly what his qualifications are, rather than yours. I think I know your qualifications.

Mr. Doherty: And, may I suggest to the witness, this room is a difficult room for me to hear in. I do not know whether the jurors over here can hear this witness or not at times. Will you just raise your voice a little bit, please?

The Witness: All right.

The Court: If the witnesses will speak so that the last juror can hear him or her, I think we will all be able to hear you clearly.

The Witness: All right.

Q. By Mr. Jaffe: Mr. Zucca, as the operator of a first- [102] class ballroom, is it necessary from a financial standpoint that the operator of this ballroom have access to name bands?

Mr. Doherty: Just a minute. That is incompetent, irrelevant and immaterial, not the subject of expert testimony, no foundation laid, hearsay, and not within the issues of the case.

The Court: I think that question has the same vice that the others had. It does not seek to have the witness disclose his knowledge. It states what counsel thinks are the elements that he desires to prove, and asks for a categorical answer which does not give the court or the jury any idea as to what his qualifications are. Objection sustained.

Q. By Mr. Jaffe: What is the value of a name band to a ballroom operator?

Mr. Doherty: That is the same objection, your Honor. I am not going to argue it. It depends upon location.

(Testimony of Joseph Zucca)

The Court: Overruled.

The Witness: Well, the value—will you repeat the question?

The Court: Yes. Read it, Mr. Reporter.

(Question read by the reporter.)

A. I can only answer that question in my particular case.

Q. By Mr. Jaffe: Please do.

Mr. Doherty: Objected to on the ground that is not [103] within the issues of the case; it is hearsay, incompetent, irrelevant and immaterial.

The Court: Well, it is really a matter for the court, in the first instance, as to qualifications; so I will ask a few questions. How long have you been connected with ballroom activities or of public entertainment?

The Witness: About seven years.

The Court: Where has your experience been during that time?

The Witness: I was in Culver City as the owner of the Casa Manana at that time.

The Court: I am not acquainted with these places by name and I would not know the Casa Manana. What size or activity does that place take in the entertainment field? I do not mean for you to tell us what you think, but what is the status of it?

The Witness: As to size, you mean?

The Court: How large is it and how large an orchestra does it have?

The Witness: It will accommodate about 2,000 people.

The Court: And the dance floor will accommodate about how many?

(Testimony of Joseph Zucca)

The Witness: About 500 couples.

The Court: That is a comparison for Terpsichorean activity, is it? [104]

The Witness: That is right.

The Court: You understand what I mean—for dancing?

The Witness: Yes, sir.

The Court: And what size bands have you employed there normally?

The Witness: Varying anywhere from 15 musicians to 30 at one time.

The Court: Has that been during this entire period of 7 years?

The Witness: Yes, sir.

The Court: That you have had that experience?

The Witness: Yes, sir.

The Court: Both as the proprietor of the concern and as the manager-executive in the conduct of it?

The Witness: Yes, sir.

The Court: I think that he is qualified.

Now, you may read the question. Objection overruled.

Mr. Jaffe: There is a pending question.

(Question read by the reporter.)

A. The value of a name band in my particular case is rather essential, due to the competition that I have in my particular locality.

Q. Could you operate profitably without name bands?

Mr. Doherty: That calls for a conclusion of the witness, entirely speculative, incompetent, irrelevant and immaterial. [105]

The Court: Yes; the way it is phrased it does not give the jury—I want you to understand, ladies and gentlemen, that the court's questions to the witness were

(Testimony of Joseph Zucca)

merely for the purpose of informing the judge as to whether the witness was qualified to express an opinion on these matters. The weight of his evidence is for you and not for the judge.

As to the witness' qualifications, if he is offered as a so-called expert witness—one who, because of his knowledge or skill or experience of certain activities of life, whether artistic, scientific or professional, may give an opinion—that is one of the exceptions to what is called the incompetency of the witness, or the hearsay rule. But that is a question of law for the trial judge, in the first instance, to determine whether the witness offered is qualified; and that qualification does not depend upon certain features that are generally accepted, of advertising or publicity or any features of that kind; it depends upon experience and knowledge to disclose one's observations from the witness stand, under oath. And I am not indicating anything by that ruling as to what, if any, value or effect you give the testimony of any witness. That is for you.

Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Just a minute. The objection is sustained.

Q. By Mr. Jaffe: Mr. Zucca, are you familiar with the [106] financial arrangements made with bands that appear in your ballroom?

A. I am.

Q. Have you personally made money when a name band did not appear at your ballroom?

Mr. Doherty: Incompetent, irrelevant and immaterial, not the subject of expert testimony.

The Court: Overruled.

The Witness: Would you read that question?

(Testimony of Joseph Zucca)

(Question read by the reporter.)

A. Certain particular weeks I have and certain times I have not.

Q. By Mr. Jaffe: Where do you get your bands from?

A. Different agents in Los Angeles.

Q. Who did you get the great majority of your bands from?

A. At the present time, I have a band that is booked independently and I bought it direct. Prior to that, I have had M. C. A. bands, played General Amusement bands.

Mr. Jaffe: You may cross-examine.

Cross-Examination

By Mr. Doherty:

Q. In other words, you procured some of your bands through the Music Corporation of America?

A. Yes, sir. [107]

Q. And you secured some of your bands through the William Morris Agency? A. Yes, sir.

Q. And you secured some through the General Amusement Corporation? A. Yes, sir.

Q. And sometimes you get the entertainment from the Fredericks Brothers Agency? A. Yes.

Q. And sometimes you have dealt direct with the band leader? A. Yes, sir.

Q. And made your own arrangement with the band leader? A. Yes, sir.

Q. And even though that band leader had an agency contract with an employment agent?

A. That I am not familiar of.

(Testimony of Joseph Zucca)

Q. The Meadowbrook is located on West Washington Street, on the right-hand side on your way to Culver City, is it not?

A. That is right.

Q. It sits back there from the road and used to be known as the Cotton Club?

A. Yes, sir.

Q. And then, under some other management, was known as the Casa Manana. Were you there during the operation as the [108] Cotton Club?

A. Not as the Cotton Club, no.

Q. But as the Casa Manana were you there?

A. Yes; I was the owner then.

Q. Then, more recently it has been known as the Meadowbrook? A. Yes, sir.

Q. Now, you speak about what name bands are. Do you know a great number of bands? A. Yes.

Q. Is Henry Busse or Busse one of those bands?

A. Yes; I would say he was a name band.

Q. He plays locally and throughout the country, does he not. A. Yes.

Q. And would you say that Tiny Hill was also a name band? A. Yes.

Q. And would you say that Sully Mason was a name band? A. Beg pardon?

Q. Sully mason?

A. I don't believe I have heard of him.

Q. You don't know him. Do you know Eva Leonard band by reputation? A. Yes. [109]

Q. Is that a name band? Did I ask you about Ancil Hill? Is that a name band?

A. I believe that is a local name band.

(Testimony of Joseph Zucca)

Q. And Shorty Sherock, is that a name band?

A. I believe so.

Q. And Carlos Molina? A. Yes.

Q. And Muzzy Marcelina? A. Yes.

Q. And Chris Cross?

A. I don't believe I have heard of him.

Q. Frankie Carl? A. Yes.

Q. He is a name band? A. Yes.

Q. And Tony Pastor? A. Yes.

Q. And, of course, without any hesitancy you will say Jimmie Dorsey and Tommy Dorsey? A. Yes.

Q. Eddie Miller? A. Yes.

Q. Glen Gray? A. Yes.

Q. And Pinkie Tomlin? [110] A. Yes.

Q. And Boyd Rayburn? A. Yes.

Q. This particular time in recent years, I think Tommy Dorsey is considered the "tops", isn't he, in drawing? A. That is right.

Q. In other words, if you can get him in, you are sure of a big crowd? A. That is right.

Q. Is that right? A. That is right.

Q. It costs lots of money, though, doesn't it?

A. Yes, sir.

Q. You have got to raise your admission prices; you have got to get a big crowd in order to make it pay?

A. Yes.

Q. Because of the big overhead, is that right?

A. That is right.

Q. You can't draw in for two nights, a two-night performance, on 12 or 13 or 14 thousand people; it would not pay, would it? A. That is right.

(Testimony of Joseph Zucca)

Q. You would have to draw a big crowd like that to meet the scale demanded by Tommy Dorsey?

A. That is right.

Q. Is that right? [111] A. That is right.

Q. There are ballrooms that operate successfully, do they not, without accentuating or emphasizing name bands?

A. I believe there are many of them; yes.

Q. Which?

A. I believe there are many of them that do.

Q. Yes. It depends a great deal upon the crowds that go there, the type of entertainment, the type of management and other factors, does it not? A. Yes.

Q. You are familiar, more or less, with the Palladium, aren't you? A. Yes.

Q. That is the biggest operation of its kind in Southern California, isn't it? A. That is right.

Q. So far as you know, it is one of the biggest in the United States? A. That is right.

Q. It is out here in Hollywood and Sunset Boulevard?

A. That is right.

Q. In fact, they operate with comparatively few bands, do they not? A. They have name bands.

Q. They bring them in just occasionally, don't they? [112]

A. No. They have name bands continuously.

Q. Have you been in the ballroom business in any other community aside from around Culver City and Los Angeles?

A. I was in the ballroom business in Hermosa Beach.

Q. Hermosa Beach? A. Yes, sir.

(Testimony of Joseph Zucca)

Q. Do you happen to know an operation which has come across my mind known as the Foreman Phillips?

A. I know of him.

Q. He operates on the Venice Beach and at the Plantation and also down at Compton. Have you kept in contact with his operation, the crowds he draws?

A. No, I haven't.

Q. You haven't followed that up? A. No, sir.

Q. And you do not know whether he uses name bands or not? A. No.

The Court: I did not hear that answer.

Mr. Doherty: He said he did not know.

The Witness: I don't know.

Mr. Doherty: Was that your answer? A. Yes.

The Court: Read the question to the witness.

The Reporter: He has now answered the question: "I [113] don't know."

Q. By Mr. Doherty: Some ballrooms cater to what is called "Westerns", don't they?

A. Yes, sir.

Q. And that is an entirely different type of band?

A. Yes, it is.

Q. And others cater to what is known as "Sweet Music," is that right?

A. Yes, that is right.

Q. From your experience in your operation down there—well, I will ask what type of music have you emphasized in Meadowbrook? A. Mostly swing.

Q. What? A. Mostly swing music.

Q. Mostly swing? A. Yes.

Q. If you should suddenly turn that over to sweet music, would you get the same crowd, from your observation? A. No; you would not.

(Testimony of Joseph Zucca)

Q. They would not come, would they? A. No.

Q. If you turned it over to Western type, you would get an entirely different crowd?

A. That is right. [114]

Q. And your operation would fail, wouldn't it?

A. That is right.

Q. So it not only means a band that can play music, but it must be a band that caters to the particular crowd that goes to that particular dance hall, doesn't it?

A. That is right.

Q. It might be a very well known band in one field and be a complete failure at your place of business?

A. That is right; that is very possible.

Mr. Doherty: Yes. That is all.

Mr. Jaffe: That is all.

Mr. Christensen: Mr. Birnie Cohen, please.

BIRNIE COHEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Birnie Cohen.

Direct Examination

By Mr. Christensen:

Q. Mr. Cohen, are you presently employed at any business, occupation or profession? A. No.

Q. Recently, however, you were, were you not?

A. Yes, sir.

Q. And that was what? [115]

A. Casino Gardens in Ocean Park.

(Testimony of Birnie Cohen)

The Court: Gentlemen, you will have to raise your voices. I have no difficulty whatever in hearing but I have to strain to hear your questions, Mr. Christensen, and naturally, the witness lowers his voice when you do yours.

Q. By Mr. Christensen: And what was your position there with the Casino Gardens in Ocean Park?

A. I was the owner, and later on, became the manager.

Q. When did you become the owner of the Casino Gardens in Ocean Park?

A. Around 1930.

Q. Did you operate that continuously until you sold it?

A. Yes, sir.

Q. When did you sell it, sir? A. In 1944.

Q. To whom did you sell it?

A. Tommy Dorsey.

Q. And thereafter you continued as manager, did you? A. Yes, sir.

Q. In addition to your 14 or so years of experience in the dance and ballroom business, did you have any other or prior experience? A. No; I did not.

Q. During the time that you were operating the ballroom, including both periods, you booked bands? [116]

A. Yes, sir.

Q. And presented dances or held dances, I think?

A. Yes, sir.

Q. Are you acquainted with the dance and ballroom business there? A. Fairly well.

Q. Are you also acquainted with a ballroom known as the Mission Beach ballroom in San Diego, sir?

A. Yes, sir.

(Testimony of Birnie Cohen)

Q. During what period of time have you been acquainted with it?

A. Last summer, I think, was the first time I have been down there.

Q. Have you an opinion as to the class of a ballroom that Mission Beach ballroom is, sir? A. Yes.

Mr. Doherty: I object on the ground it is not a basis for opinion evidence, incompetent, irrelevant and immaterial, and not an issue in the case.

The Court: Yes. The only predicate so far, or hypothesis, is his knoweldge of the Casino. That would not qualify him. He might make a comparison with his own institution which would not be a fair comparison. He has not shown any additional knowledge thus far.

Mr. Christensen: I see. [117]

Q. Are you acquainted with other ballrooms?

A. Yes.

Q. What other ballrooms do you know about?

A. Well, I know practically—I have seen all the ballrooms on the Pacific Coast, perhaps, and a lot of them throughout the United States.

Q. Now then, I repeat my question. Are you able to tell us what class of ballroom the Mission Beach ballroom down at San Diego is?

A. I would say it was a first-class ballroom.

Q. Do you know what is meant by the term "name band", sir? A. Yes.

Q. Will you please tell me? [118]

A. Any band that is popular among a group of people. that has had a lot publicity, through musical numbers they have played on the air or records they have made, or by the popularity of the leader; a band that would attract a large crowd.

(Testimony of Birnie Cohen)

Q. Have you an opinion upon the question of whether or not use of a name band is essential to the successful operation of a first-class ballroom?

Mr. Doherty: Object on the ground it is incompetent, irrelevant and immaterial, and not a matter upon which there can be expert testimony, and hearsay.

The Court: Read the question, please.

(The question was read.)

The Court: If he can qualify on that, he could answer it, but I don't believe he has yet qualified on that phase. He would just be giving his own view that would not be based on a hypothesis that would warrant him to express an opinion on it. Sustained.

Q. By Mr. Christensen: Well, is the Casino Gardens Ballroom at Ocean Park a first-class ballroom?

A. Yes, sir.

Q. Have you observed the operations?

A. Yes, sir.

Q. And the manner of operation of other first-class ballrooms here in California, let us say? [119]

A. Yes.

Q. Over a period of how long, sir?

A. Around fifteen years.

Q. That has been your sole occupation, has it, the ballroom and dance business during that period of time, sir?

A. That's right.

Q. Now, I will ask you if you have an opinion upon the question of whether or not the use of name bands is essential to the successful operation of a first-class ballroom.

Mr. Doherty: The same objection.

The Court: Overruled.

The Witness: A. In most cases it is.

(Testimony of Birnie Cohen)

Q. By Mr. Christensen: Well, can you explain your answer more clearly?

A. Well, some places operate strictly with name bands, and others have what they call B-bands, and they use—they have to have a name band every now and then to kind of pick it up and enlarge the crowds.

Q. Would it depend upon the type of competition which a ballroom has? A. Yes.

Q. Would it be true if the competitor was using stellar attractions in the way of bands that you, too, would have to do it in order to attract people?

A. Yes. [120]

Mr. Christensen: That is all. You may examine, sir.

Mr. Doherty: Is that all?

Mr. Christensen: Yes, sir.

Cross Examination

By Mr. Doherty:

Q. Mr. Cohen, the Casino Gardens is located, I believe, on Ocean Park Pier?

A. Right on the ocean front at Ocean Park.

Q. On the ocean front? A. Yes.

Q. And you say that in 1944 was purchased by Tommy Dorsey, the noted—

A. Orchestra leader.

Q. —orchestra leader. So far as band leader, is he a swing band leader? I don't know one from the other.

A. They claim he is a swing band leader.

Q. Now, you said that certain bands were known as name bands because of the publicity and popularity of the leader, and recordings, and things like that. Is this about correct, that certain bands that are very well known never play in ballrooms but are confined entirely to radio?

A. That's true.

(Testimony of Birnie Cohen)

Q. And then there is another type of band that maybe occasionally does hotel work, like at the Ambassador or the Waldorf in New York, and so forth, but play in pictures? [121]

A. That's right.

Q. Then there is another type of band that plays in theatres on the circuit like the Orpheum here?

A. Yes, sir.

Q. Then there is another type of band that plays or specializes in strictly dance music?

A. That's right.

Q. And that dance music may be of various types? And I submit, Mr. Cohen, I don't know how to dance, so don't laugh at me when I pull boners. I don't know how to dance. Some are known as symphonic bands, like our great symphony orchestra here?

A. Yes.

Q. Then others are what you call sweet music, like Lombardo?

A. That's right.

Q. Then there are others, what is known as the so-called swing bands?

A. Yes.

Q. Then others are extreme in that they are called the jump music, or the jive music, or hot music; is that correct?

A. That's right.

Q. Now, it depends upon the location as to what type of band should be brought into those places, does it not?

A. Yes. [122]

Q. In other words, if you had built up a trade like Mr. Zucca,—you were in the court room when he testified, weren't you?

A. Yes, sir.

Q. When you build up a trade of a particular type, you have a particular audience, and if you don't adhere to that type of music your audience would leave you, wouldn't they?

A. That's right.

(Testimony of Birnie Cohen)

Q. Merely because it is a name band doesn't mean anything unless it is the type of name band you want?

A. That's right.

Q. And these name bands originate by showmanship, mostly, of the leader, do they not?

A. Mostly, yes, sir.

Q. In other words, he is a colorful fellow, he advertises, and he does things that attract attention; is that correct?

A. That is correct.

Q. Sometimes he has what is known as a good arranger; in other words, a man who can take a standard piece of music and rewrite it so that it will sound catchy and attractive?

A. That's right.

Q. And sometimes he makes a record of that, and it takes, and people like it, and he gets a name in a brief time?

A. That's right. [123]

Q. And sometimes their names go down almost as fast as they come up,—

A. Mostly.

Q. Isn't that right?

A. Yes, sir.

Q. In other words, what may be a name band, so-called, in 1945 might be one of those that also ran in 1946?

A. That's right.

Q. In other words, he may move to a place and have an engagement, and you pay him five, six, seven, eight, nine, ten thousand dollars for a week, and he wouldn't draw any crowds, and then he hits another place and it happens again, then his popularity just goes out, doesn't it?

A. It goes down, yes, sir.

Q. And the dance hall people don't want him any more?

A. That's right.

Q. You have had name bands down at Casino Gardens that lost you money, haven't you?

A. Yes, sir.

(Testimony of Birnie Cohen)

Q. Good name bands, so-called big name bands?

A. Yes, sir.

Q. Is that right? A. Yes.

Q. I mean names that stood at that particular time up near the top of drawing, as a drawing attraction?
[124]

A. Yes, sir.

Q. So there are many elements that go into operating a dance hall? A. Yes, sir.

Q. Good management, good publicity, a fine public relations, knowing how to appeal to a particular crowd and hold that crowd, and economical operation, and many other things go into it, don't they? A. Yes, sir.

Q. So that you can't say just one thing makes a success of a dance hall? Many things go into making it a success? A. Many things go into it.

Q. Is that right? A. Yes, sir.

Q. You get your attractions, some, from the Music Corporation of America, or did down at Casino Gardens?

A. Yes, sir.

Q. You got some from the General Amusement Corporation? A. Yes, sir.

Q. You got some from the William Morris Agency?

A. Yes, sir.

Q. And some from the Fredericks Brothers Agency?

A. Yes, sir.

Q. By the way, I believe in the first part of your testimony I didn't catch the first word or two. I think you [125] said Mr. Finley had been with you down at Casino Gardens?

A. That question wasn't asked me.

(Testimony of Birnie Cohen)

Q. I thought you were asked whether or not you knew Mr. Finley, and if that wasn't asked, I misunderstood. He was at one time down at Casino Gardens?

A. Yes, sir.

Q. Is he still there? A. No, sir.

Q. He has no connection out there now?

A. No, sir.

Q. During your ownership of Casino Gardens did you always run it on the policy of so-called highly advertised, big name bands? A. No, sir.

Q. What type of band did you use?

A. Well, I used local bands and bands that would qualify as B-bands, as they call them, in the business.

Q. In other words, that was sort of an arbitrary proposition between the price paid Tommy Dorsey and Jimmy Dorsey, and the bands that you took?

A. Yes, sir.

Q. In other words, much lower in price?

A. Yes, sir.

Q. And was it a successful operation?

A. Yes, sir. [126]

Q. Now, you have, or while you were down there at Casino Gardens you had, of course, Tommy Dorsey and his brother Jimmy? A. And Jimmy.

Q. And they were very popular? A. Yes, sir.

Q. And that was a different type operation?

A. Yes, sir.

Q. Do you know a band named Dick Allen?

A. Yes, I do.

Q. Is that a name band? A. No.

Q. You don't know whether it was or not?

Mr. Christensen: He answered "No."

(Testimony of Birnie Cohen)

Q. By Mr. Doherty: It was.

A. It wasn't a name band.

Q. It was not. Spade Cooley is a name band, isn't it?

A. He is a name band in his category, yes.

Mr. Doherty: I think that is all.

Re-Direct Examination

By Mr. Christensen:

Q. Mr. Cohen, at the time that Mr. Finley was at Casino Gardens, he was the manager, wasn't he?

A. He had a contract that way, yes.

Q. As a manager? [127] A. Yes.

Q. Did the Casino Gardens lose any money under Mr. Finley's management? A. No.

Q. It made money, did it? A. Yes, sir.

Q. And just before he came in there, it lost money, didn't it, for a period of time?

A. I operated it myself.

Q. I mean during the early part of, let us say, 1944, Casino Gardens lost money, didn't it?

A. I don't know—in the early part of 1944, I had the place myself.

Q. Well, I mean just previously to the time Mr. Finley took over at Casino Gardens? A. Yes.

Q. It lost money, didn't it? A. Yes.

Q. And in the year before that it lost money, didn't it?

A. Well, I am not qualified to say at that time, because I really didn't know. Mr. Dorsey was operating it, and I don't know just actually what happened there at all.

Q. But after Mr. Finley came in it made money?

A. Yes, sir. [128]

Q. To a point that he was able to sell out very profitably? A. That's right.

Mr. Christensen: Thank you. That is all.

(Testimony of Birnie Cohen)

Re-Cross Examination

By Mr. Doherty:

Q. With Mr. Finley's entrance into Casino Gardens, also at the same time the Dorsey brothers came in, that is, as the operators or owners?

A. Dorseys were in there about a year or so before Mr. Finley came in .

Q. Did you observe Mr. Finley's operation there as manager?

A. Yes, sir.

Q. You had opportunity to observe the type of operation that he gave to the place?

A. Yes, sir.

Q. You have had experience in observing managers of ballrooms, have you?

A. Yes, sir.

Q. Would you consider Mr. Finley a good operator of a ballroom, an experienced, capable, efficient operator?

A. Yes, Mr. Finley was a good promoter, promotionally.

Q. In other words, there is a difference between promotion and management, is there not? [129]

A. Yes, sir.

Q. I am asking you if he was a good manager of a ballroom.

A. Yes, sir.

Q. Also a good promoter?

A. Yes, sir.

Q. You found him to be a man who knew the business thoroughly? I am speaking now of the operation end of it, not the promoting end.

A. I didn't get the question.

Q. Do you consider Mr. Finley an experienced, capable, competent operator from the standpoint of management, not from the standpoint of promotion?

A. Yes, sir.

Q. How is that?

A. Yes, sir.

(Testimony of Birnie Cohen)

Q. He sold his interest to the Dorsey brothers, did he not? A. Yes, sir.

Q. And when he left, you left? A. Yes, sir.

Mr. Doherty: And neither one of you have any connection there now. That is all. [130]

Re-Direct Examination

By Mr. Christensen:

Q. I forgot to ask you, while Mr. Finley was there at the Casino Gardens you played both sweet and swing music, didn't you? A. Yes, we did.

Q. And you used M. C. A. bands there, Music Corporation of America bands?

A. We used General Amusement and M. C. A. bands?

Q. Could it have been operated without M. C. A. bands? A. Not very well.

Q. Not profitably, at any rate; is that right?

A. I wouldn't say that. Tommy Dorsey was an M. C. A. band, and Jimmy Dorsey, his brother, was a General Amusement band.

Q. Now, then, you spoke about the management being or the duties of one operating a ballroom as being in two parts, one, managerial and the other promotional. You divided it. The promotional is those activities which bring people to the ballroom; is that right? A. Yes.

Q. An in that you say Mr. Finley was exceedingly good? A. Yes.

Mr. Christensen: All right. Thank you.

Mr. Doherty. That is all. [131]

The Court: We will take a recess for a few minutes, ladies and gentlemen. Remember the admonition which I gave, and keep its terms inviolate. Occupy the jury rooms, please.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Doherty: I want to recall Mr. Cohen, Mr. Birnie Cohen. I would like to ask him, with your permission, your Honor, a couple more questions which I overlooked.

The Court: Apparently I didn't take the recess at the opportune time. I tried to, but apparently I didn't. Proceed.

BIRNIE COHEN,

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Re-Cross Examination

By Mr. Doherty:

Q. Mr. Cohen, in your direct examination you spoke about Mr. Finley selling out at a profit. You don't know what he received, do you, as compared with what he put into the enterprise?

A. I know what he received, but I am not really positive of what he put in, although I have been told.

Q. In other words, you have no personal knowledge of that? [132]

A. No, sir.

Q. Now, during Mr. Finley's operation at Casino Gardens he introduced liquor into that establishment for the first time, did he not?

A. Yes, sir.

Q. There was no liquor there until Mr. Finley came there?

A. That's right.

Q. Now, do you know Mr. Joe Ross of Judge Pacht's firm?

A. Yes, sir.

Q. Did you have a conversation with him out at the Hillcrest Country Club a week ago Saturday, January 19th?

(Testimony of Birnie Cohen)

A. I played golf with him out there that day.

Q. You played golf in a foursome that day?

A. Yes, sir.

Q. Did you not at that time have a conversation with Joe Ross in which you said, in substance and effect, that you would like to testify in this case and state that Mr. Finley was not a good operator, that he was a phony?

A. I don't remember that conversation.

Q. You don't remember that conversation?

A. No.

Q. Do you remember discussing Mr. Finley with Mr. Joe Ross on that occasion?

A. No, I don't. [133]

Q. Do you remember stating that you were glad that Mr. Finley was out of the Casino Gardens?

A. I may have said it, but—I made that remark.

Q. Also, on that occasion that he was never around the Casino Gardens?

A. I think I said that. I don't know.

Q. Now, you also know Mr. Lawrence Barnet, one of the defendants in this case?

A. Yes, sir.

Q. And you had a conversation with him recently, on last Friday, at his office?

A. I was in his office last Friday, yes.

Q. You went to his office?

A. Yes.

Q. You went there of your own volition?

A. Yes, sir.

Q. He didn't ask you to come, did he?

A. No, sir.

Q. Do you remember on that occasion in Mr. Barnet's office that you said to him that you wanted to be a witness

(Testimony of Birnie Cohen)

in this case so that you would be able to testify that Mr. Finley was a phony?

A. No, I don't remember saying that.

Q. Did you discuss Mr. Finley in that conversation?

A. I don't know whether I did or not. [134]

Q. You didn't say that, in substance or effect?

A. I don't remember it.

Q. Did you have any conversation with Mr. Ames Bishop and Mr. Hal Howard at the M. C. A. office last Friday?

A. I was over there, yes, sir.

Q. Of your own volition?

A. Yes, sir.

Q. And you talked with those two gentlemen?

A. Yes, sir.

Q. Did you not say, in substance and effect, on that occasion, that Mr. Finley was a two-bit operator?

A. No, I don't remember making that remark.

Q. What did you say?

A. I don't remember making any remark like that.

Q. You never discussed Mr. Finley with Mr. Bishop or Mr. Hal Howard on last Friday?

A. We talked about the operation out at the ballroom, yes, sir.

Q. And you told them, did you, that it was a first-class operation under Mr. Finley?

A. I don't remember ever saying that, either.

Q. And you do not remember saying that Mr. Finley was a phony?

A. No, I don't.

Q. Or that he was a two-bit operator? [135]

A. No, sir.

Q. But you did say that you were glad he was out of there?

A. Yes, sir.

Mr. Doherty: That is all.

(Testimony of Birnie Cohen)

Re-Direct Examination

By Mr. Christensen:

Q. Why were you glad he was out?

A. Well, he wasn't — the operation wasn't — there wasn't the feeling there. There was always a little strife around in the organization during the time Mr. Finley was there.

Q. He was energetic and driving, wasn't he?

A. I don't know how you mean that.

Q. He was continually wanting things done, wasn't he?

A. There was a little upheaval out there all the time. The thing wasn't operating smoothly at that time.

Q. Because he was trying to promote it all the time, wasn't that it?

A. Well, there was discussion with Mr. Dorsey and Mr. Finley. They didn't seem to be getting along very well.

Q. Oh, it was a personal matter between Mr. Dorsey and Mr. Finley?

A. I think it was a personal matter.

Mr. Christensen: I see. Thank you. [136]

Re-Cross Examination

By Mr. Doherty:

Q. Mr. Dorsey wanted Mr. Finley out of there, didn't he, and said so?

A. He made that remark, yes.

Mr. Doherty: That is all.

(Testimony of Birnie Cohen)

Re-Direct Examination

By Mr. Christensen :

Q. You know that Mr. Dorsey has already signed a contract to play for Mr. Finley this coming spring, don't you, at Mission Beach?

A. I understood there is a contract.

Q. And that that was entered into since that time?

A. **Yes.**

Mr. Christensen: That is all.

The Court: Which Mr. Dorsey is that?

The Witness: I think it is Tommy and Jimmy Dorsey.

Mr. Christensen: That is all. Thank you.

(Witness excused.)

The Court: Call your next witness, gentlemen.

Mr. Christensen: Mr. Ralph Wonders. I was giving counsel an opportunity there.

The Court: No, just move right along. [137]

RALPH WONDERS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Ralph Wonders, W-o-n-d-e-r-s.

By Mr. Christensen:

Q. Mr. Wonders, let's you and I both try to keep our voices up as we talk. A. I will be glad to.

Q. By whom are you employed, Mr. Wonders?

A. General Amusement Corporation.

(Testimony of Ralph Wonders)

Q. What is the business, or occupation, or profession of the General Amusement Corporation, sir?

A. Well, we book bands, book radio shows into the different networks, and shows and bands into spots.

Q. When you say "networks," I assume you mean radio networks; is that correct? A. Yes.

Q. And where else?

A. Cocktail units, cocktail lounges; acts into theatres, and bands into theatres. General Amusement is just what it implies. We are in the general amusement business. We supply amusement for most anything.

Q. Ballrooms, too? [138] A. Yes, sir.

Q. And your capacity or position there with the General Amusement Corporation is what, sir?

A. I have the title of vice-president and manager of the West Coast office.

Q. And that office is located here in Los Angeles?

A. At 9028 Sunset Boulevard.

Q. What are your duties as vice-president and general manager of the General Amusement Corporation, sir?

A. Well, I look after the general things around the office. I book bands. I do general booking also, as far as spots, radio shows, pictures, are concerned.

Q. How long have you been with General Amusement Corporation here on the coast?

A. Seven and a half years.

Q. And prior to that time, to the seven and a half years?

A. I was in New York with the General Amusement Corporation for two years.

Q. And your duties there were what, sir?

A. Practically the same as they were here, or are here.

(Testimony of Ralph Wonders)

Q. Then let's go back of nine and a half years ago, and what was it before, sir?

A. I was with the Columbia Broadcasting System.

Q. What were your duties there? [139]

A. Manager of the Columbia Artists Bureau.

Q. What does that mean?

A. The Artists Bureau was run as a subsidiary of the Columbia Broadcasting System. We managed and signed up acts and bands, and put lines into hotels. In other words, it was practically the same as the General Amusement Corporation, only it was connected with the Columbia Broadcasting System.

Q. How long have you been in the business, let us put it, of booking bands?

A. Approximately thirty years.

Q. That has been your full-time occupation during that period of time, sir?

A. With the exception of the war, the First World War.

Q. Could you explain to us the procedure in booking bands into a ballroom?

A. Well, we have bands that are playing the New York territory or the Chicago territory, and we go to a place like the Palladium and solicit their business, and try to get a four or six weeks booking to bring them into our territory, and then we sell them on from the Palladium, and route them up and down the coast, possibly at Mission Beach or at Casino Gardens, and one nighters up through Sacramento and up through that territory.

Q. How are those arrangements made? Is it by personal contact or otherwise? [140]

A. Personal contact, by telephone and telegraph.

Q. By mail? A. By mail sometimes.

(Testimony of Ralph Wonders)

Q. Let us take, for example, if the band were in New York and it wishes to come here. What is your first step?

A. Try to secure a booking, what we call a spot booking to guarantee so many weeks in one spot, to bring it into the territory.

Q. And your territory would comprise what?

A. From the Rocky Mountains west.

Q. Then to take our hypothetical case, would you start to book them as they come east as soon as they come within your territory?

A. You mean as they come west?

Q. I beg pardon. As they come west?

A. Yes, we pick them up at our territory line, which would be Salt Lake City, if they came in that way.

Q. And then you would contact a ballroom operator en route? A. Yes.

Q. Or perhaps I should have said ballroom operators en route? A. Yes, sir.

Q. Do you prepare contracts?

A. Yes, sir. [141]

Q. Do you send them to wherever the band is?

A. Yes, or we sometimes hold them until they come into the territory. If we know where to reach them, we send them out and have them sign it.

Q. And you send them to the ballroom operators?

A. They sign them also.

Q. Help us a little bit in this. Mr. Doherty and I certainly should not be trying this case. We don't know very much about bands or music, so again I ask you to bear with me if I appear to ask a question which is ele-

(Testimony of Ralph Wonders)

mental to you. But when you know that a band is coming west, who then fixes the itinerary of the band?

A. Well, that is done in different ways. Certain leaders will, if they have confidence in you, and some of them that haven't been on the coast before, will let us go ahead and arrange the tour. Of course, everything is submitted to the band leader, or his manager, and they let us sometimes route it to the best of our ability, and we submit it to them, and they O.K. it.

Q. Generally speaking, I take it a band has a manager, in addition to a leader? Is that a correct statement or not, sir?

A. Yes, sir.

Q. Now, who arranges transportation for these bands?

A. Well, the band manager or band leader, or whoever [142] travels with the band, generally arranges for the transportation.

Q. Does a booker do that at times?

A. Sometimes, when we can help out, with bands coming into the territory, where we have—where the manager hasn't arranged it, they wire us to take care of certain transportation sometimes.

Q. This might be a good time for you to tell us this: In addition to there being a leader, you told us there is a manager normally connected with a band as a part of their organization. What other personnel is there besides those who actually play instruments?

A. Well, sometimes there is a publicity man, a band manager or a road manager, and sometimes a so-called band boy.

Q. What does a band boy do, sir?

A. He sees that the baggage gets on the train, gets off, sees to the instruments, sees that the instruments

(Testimony of Ralph Wonders)

and stands are set up, and the music is properly packed, and is general errand boy, if you want to call him that.

Q. Mr. Doherty mentioned an arranger. Tell me what that is.

A. Some bands have arrangers in their bands. Some bands have arrangers that stay in one spot, like New York or Chicago, and some arrangers come on with the bands.

Q. Is it characteristic, or is one of the characteristics [143] of a band its method of arrangement of the pieces which it plays?

A. Well, arrangements are a very important part of an organization.

Q. Would you explain there? I don't know enough to ask you the question, but explain what you mean by this "arranger," and what its value and effect is.

A. Well, I will go on record that I am not a musician. I know nothing about music. But an arranger will take a certain number, or the arrangers take a certain number and make a certain arrangement out of it which seems to be more appealing to the public than originally written. Sometimes they over-arrange. Sometimes, and particularly in your records, your commercial records, an arrangement of a tune is very important.

Q. Do the bands carry their own arrangements with them, except in those cases where you have told us they did not, sir?

A. Arranger or arrangements, now?

Q. Let me ask you about arrangements, first.

A. Arrangements they carry with them. That is the music they use and play on their jobs. [144]

Q. And you say that this was very important to the band? A. Very important.

(Testimony of Ralph Wonders)

Q. The band also has certain paraphernalia which it carries with it, doesn't it? A. Yes, sir.

Q. Scenery, maybe? A. Well—

Q. Tell me what they have.

A. Not scenery particularly. They carry their clothes, of course, their wardrobe trunks, their instruments, their band stand that they put their arrangements on in front of them, with their names on it, and many other incidentals as a band of 18 men would have to carry.

Q. Are those things, too, characteristic of a particular band, sir?

A. Of all the top name bands.

Q. Is it important, then, to the band?

A. Yes, sir.

Q. And, as a part of your duties in booking bands, do you have occasion—or that is not the way to say it—do you go and visit ballrooms? A. I do.

Q. What is your purpose in doing that?

A. Well, we are always looking for new material to [145] sign up to our agency; and I am well acquainted with a lot of the band leaders. I go for a personal call to see them, or we go for a booking.

Q. You say you go to see the band leaders. When they are on tour in your territory, of course, do you contact them? A. Yes, sir.

Q. By that, I mean when necessary, by mail or telephone or telegraph?

A. Either way; personally, probably, sometimes.

Q. In so doing is it necessary and do you cross state lines? A. Yes.

Q. Are you familiar with the Mission Beach ball-room? A. Yes, sir.

Q. You have been there? A. Yes, sir.

(Testimony of Ralph Wonders)

Q. Are you acquainted with Mr. Finley?

A. I know Mr. Finley.

Q. For how long have you known Mr. Finley?

A. About a year and a half.

Q. Have you had experience with Mr. Finley in the booking of bands?

A. Yes, sir.

Q. Tell us briefly your experience with him in booking [146] bands, sir.

Mr. Doherty: It is incompetent and immaterial to any issue of the case, including the witness.

The Court: Overruled. You may answer.

The Witness: Will you repeat the question?

The Court: Yes; we will have the reporter read the question.

(Question read by the reporter.)

A. Well, in booking with Mr. Finley, there is not much. He knows what bands, as a rule, he would like to have, if you can get them for him. Once you can sell him on the idea the band is good for him, it doesn't take very long to make a deal. He makes good, snappy judgments. My dealings with Mr. Finley have been very fine all the way through.

Q. By Mr. Christensen: Have you had occasion to observe his manner of operation of the Mission Beach since he has had it?

A. Yes.

Q. Have you also had occasion to observe his manner of operation of the Casino Gardens at Ocean Park during the time he was there?

A. Yes, sir.

Q. Have you also had occasion to observe his management and operation of the Trianon ballroom at San Diego?

A. Yes, sir. [147]

(Testimony of Ralph Wonders)

Q. Have you an opinion as to his ability as a manager of such ballrooms?

A. As to the Trianon and Casino Gardens and the Mission Beach I found them to be a very well run ballroom.

Q. When you first dealt with Mr. Finley it was with reference to booking of bands, wasn't it?

A. (Witness nodding.)

Q. Before you would book a band into a ballroom would you make any investigation of the operation of the ballroom.

A. We would if it was a new client.

Q. Well, Mr. Finley was a new client to you about a year and a half ago, I believe you said?

A. That is right.

Q. Well, did you do that with him? A. I did.

Q. After you did that, you agreed to do business with him?

A. Yes. Even I went further than that. I even made him pay a deposit, in fact, for two weeks' salary of the first band I put with him—

Q. And thereafter— A. —in advance.

Q. Thereafter, what did you do?

A. Strictly a business deal; every band was paid on time. [148]

Q. Then, to put it in a nutshell, he met all the requirements of your office? A. Yes, sir.

Q. It has been mentioned here this morning that there are two functions in the operation of a ballroom operator: one, strictly managerial of the place, and the other, promotional; is that true, sir?

A. A very important part.

(Testimony of Ralph Wonders)

Q. A moment ago I asked you concerning your opinion of him and you said, "finest." Now, would that be true both with reference to the managerial and promotional, or just one of them? A. No; to both.

Q. I see. In your opinion, how important is it to the successful operation of a ballroom that the operator have promotional ability? A. Very important.

Q. Could you illustrate to us?

A. Well, you could put many names into a room and if you don't tell somebody they are there, I don't know how they would go in to see them; and promotion is a very important thing in running a ballroom, the same as a theatre. There is the proper advertising in advance, the proper promotion in advance to instruct your public that on a certain date you will have a certain name or a certain attraction. [149]

Q. When and where did you first—you told me about a year and a half ago you first met Mr. Finley—but can you more definitely fix the date and the place and the occasion?

A. Well, I went to San Diego. I found out that Mr. Finley was bidding on Mission Beach and I knew that he was at that time operating the Trianon; so Mr. Webster, who works with me and books one-nighters, made a trip to San Diego to the Trianon ballroom to see Mr. Finley. So that is where I first met Mr. Finley, in the Trianon ballroom.

Q. At that time—and you can only, I believe, answer this question yes or no—did you have some conversation with Mr. Finley concerning the question of whether or not you would assist him in furnishing bands if he was the successful bidder?

A. I did have that conversation? Yes,

(Testimony of Ralph Wonders)

Q. Oh, by the way, did you know Mr. Daillard?

A. Yes, sir.

Q. Wayne Daillard? A. Yes, sir.

Q. How long have you known him, sir?

A. I have known Mr. Daillard 15 years or better.

Q. Have you ever talked with Mr. Daillard concerning his arrangement or agreement with Music Corporation of America relative to the furnishing of name bands to him? A. Yes. [150]

Q. When did that occur, sir?

A. On many occasions.

Q. Could you help us by more definitely fixing one occasion, sir?

A. Well, I have been down to the Pacific Square ballroom, talking bands to Mr. Daillard there. I have talked with him in the City of Los Angeles. I have talked with him in my own home. I have talked with him in his office, upstairs above the Pacific ballroom.

Q. Was any other person present on any of these occasions besides you and Mr. Daillard?

A. I think Mr. Webster was with me at one time, too.

Q. At or about the time that the bids were let and Mr. Finley acquired the lease on Mission Beach Amusement Center did you talk with Mr. Daillard?

A. At the time the bids were let?

Q. At or about the time, sir?

A. I talked with Mr. Daillard shortly before or right after the bid was made—right after it was made.

Q. Where was that conversation, sir?

A. We had lunch at the Players Club?

Q. Can you more definitely fix the date, sir, than shortly after? Is that the best you can do?

A. I think it was in November.

(Testimony of Ralph Wonders)

Q. Of the year 1944, sir? [151]

A. Yes.

Q. You say you had lunch with him at the Players Club. The Players, that is an eating place out on the strip, is that right?

A. Out on the strip.

Q. How was that luncheon engagement arranged, sir?

A. Well, I talked with Mr. Daillard a day before, and he called me when he came into town and said he would like to have lunch with me, and I agreed to go with him and we went to the players.

Q. Anyone else present at that occasion, sir?

A. Jack Flynn of the Morris office.

Q. Was there a discussion at that time pertaining to the operation of Mission Beach ballroom or of bands for the San Diego area?

A. Well, the discussion was mostly about bands for the Pacific Square.

Q. All right. Will you tell us what the conversation was, sir?

Mr. Doherty: That is subject, your Honor, to our objection it is hearsay, incompetent and immaterial, no foundation laid, and on his promise that if it is not connected up, a motion to strike will lie by the defendants.

The Court: The objection is overruled, with the same reservation that heretofore has been made with respect to [152] similar objections and similar rulings. We will have it read now.

(Question read by the reporter.)

A. Mr. Daillard wanted to know whether or not we would continue doing business with him, and what he would like to have would have been us to give him a first refusal on all bands we had coming into the territory.

(Testimony of Ralph Wonders)

Q. By Mr. Christensen: Tell us all of the conversation?

A. Well, that was the general gist of it. The rest was some of a personal nature.

Q. What reply, if any, did you make to him?

A. I didn't agree to it.

Q. That you did not agree to it might possibly be your conclusion; if you can, tell us what you said to him.

A. Well, I told him frankly that the situation in San Diego was so that I welcomed some other competitor down there, because it would give us a chance to get our bands into other places; that I sell bands to anybody; that we were in the general band business.

Q. Hadn't you been able to book any bands into Pacific Square theretofore?

A. Yes; we booked some of our name bands into the Pacific Square.

Q. Then, what did you have in mind there? What was your statement there, then? [153]

A. Well, my statement was that that was what Mr. Daillard wished us to give him, the first refusal of any bands before we offered it to a competitor.

Q. Mr. Daillard had theretofore told you that he had an agreement with M. C. A. ?

A. Well, I knew about the agreement with M. C. A.

Q. You talked with representatives of M. C. A. concerning it, too, did you? A. Yes, sir.

Q. After that contract went into effect were you able to book any bands into Pacific Square?

A. Some; our top name bands.

Q. How did you do that?

A. Well, I always would go direct to Mr. Daillard.

(Testimony of Ralph Wonders)

Q. What would happen when you would go to Mr. Daillard and tell him you had a band? Then what?

A. Well, he would either—if it played the Palladium and was a top name band, Mr. Daillard was always interested in playing them into Pacific Square.

Q. Did you make a contract with him then?

A. I would go direct to Mr. Daillard and I always sent my contracts of the bookings with us direct to Mr. Daillard.

Q. You mean previous to the time of the contract with Mr. Daillard and the Music Corporation?

A. No; during and before that; before that and still [154] after that.

Q. Did Mr. Daillard make the bookings right with you? A. Yes.

Q. On all occasions?

A. Not on all occasions; no, sir.

Q. What was the general practice?

A. Well, I would even call Mr. Daillard and practically make that deal, and five minutes, fifteen or a half hour later, Mr. Bishop from the M. C. A. would call me and would ask me why I called Daillard direct. I told him that was the way I was doing business.

Q. What else did he say?

A. Well, he knows that he is booking the place; why don't I call him.

Q. Would you have to split commissions with anybody on that?

Mr. Doherty: That would call for his conclusion. He may relate the conversation.

The Court: Yes.

(Testimony of Ralph Wonders)

Q. By Mr. Christensen: Tell us what was said concerning that.

A. Well, they always asked us to split commissions on bands. We didn't do it on many occasions; only on one or two occasions.

Q. You mean bands that were booked right into the [155] Pacific Square? A. Yes, sir.

The Court: Will you read that answer, please, Mr. Reporter?

(Previous answer read by the reporter.)

The Court: You are referring to the Pacific Square when you use the term "they"?

The Witness: I was referring to both, both Pacific Square and Mission Beach, because, if the question—if I know it rightly, was if Mr. Daillard had, and I was speaking frankly, because Mr. Daillard had both at one time, Mission Beach and Pacific Square.

The Court: You are referring to Daillard in that answer?

The Witness: Yes, sir.

Q. By Mr. Christensen: Did you have a conversation with the defendant Bishop about ten days before Mr. Finley got the lease on Mission Beach?

A. Yes.

Q. Was that a personal invitation or was it by way of telephone?

A. By way of telephone.

Q. Did he call you or did you call him, sir?

A. He called me.

Q. At your office? A. Yes, sir. [156]

Q. You know Mr. Bishop, don't you?

A. Yes, sir.

(Testimony of Ralph Wonders)

Q. How long have you known him?

A. Well, ever since I have been on the Coast; about seven years.

Q. What did he say and what did you say on the occasion of that conversation?

A. Mr. Bishop called me on the phone in my office and asked me if I would come down to San Diego for Mr. Daillard, to appear before the City Council; that the bid was up for Mission Beach and he would like to have me come down.

Q. Did he tell you what he wanted you to say or do, if anything?

A. Well, he wanted me to bring a list of my bands down and present that list of bands to the City Council.

Q. And what else, if anything?

A. Well, that was the gist of the conversation on the telephone. I refused to go.

Q. And what, if anything, did Mr. Bishop say in reply to that?

A. Well, he told me—it was general conversation—he told me that I was very friendly with Daillard and that I should do that for Daillard; and I admitted I was very freindly with Mr. Daillard, but I didn't think it was very good business for me to go down to San Diego and appear for [157] anybody.

Q. Did he tell you what, if anything, he wanted you to tell the City Council?

A. No, he didn't. He asked me to bring a list of my bands.

Q. Did he want you to testify for Mr. Daillard or for Mr. Finley?

(Testimony of Ralph Wonders)

Mr. Doherty: The question calls for his conclusion, without the conversation.

The Court: That is right. State what he said.

Q. By Mr. Christensen: What did he say? Did he say anything about that?

A. He wanted me to testify for Mr. Daillard.

Mr. Christensen: Would this be a good time to take a recess, your Honor?

The Court: I think it would, yes.

Ladies and gentlemen, we will take a recess until 2 o'clock this afternoon. Remember the admonition and keep its terms inviolate. Be here at 2 o'clock, please.

(Whereupon, a recess was had until 2:00 o'clock p. m. of the same day.) [158]

Los Angeles, California; Wednesday, January 30, 1946.
2 P. M.

The Court: All present. Proceed.

RALPH WONDERS,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Christensen:

Q. Mr. Wonders, my associates have invited my attention to the fact that I didn't ask you if that was all of the conversation that was had upon the occasion when you were having luncheon at "The Players" with Mr.

(Testimony of Ralph Wonders)

Daillard and Mr. Flynn. Did Mr. Flynn say anything there?

A. Yes, Mr. Flynn said he was under the impression that all the agencies were splitting commissions at Mission Beach, and he had found out that wasn't so, and he was very much put out about it.

Q. What did Mr. Daillard say about that?

A. Mr. Daillard said from now on we could go direct to him, and there would be no more split commissions.

Q. Did it work out that way?

A. Not exactly. Mr. Bishop still called.

Q. I beg pardon?

A. Mr. Bishop still called about bands. [159]

Q. Do you mean after you had talked to Mr. Daillard about booking a band?

A. In regard to split?

Q. Yes. A. We didn't split any more.

Q. I mean, you say Mr. Bishop continued to call or kept on calling.

A. To find out what we had available.

Q. And there were occasions, were there not, when you would tell Mr. Daillard you had a band available? Did that happen?

A. In what year are you talking about?

Q. In the year, 1945, sir.

A. No, we didn't have. We had some bands available, but we sold nothing in Pacific Square.

Q. I see. Now, during the year of 1945 the General Amusement Corporation had how many name bands available to operators in the San Diego area, sir?

A. We had Jimmy Dorsey, Frankie Carle, Tony Pastor, Glenn Gray, and I believe one other band. Five in total.

(Testimony of Ralph Wonders)

Q. Was that Stan Kenton?

A. Stan Kenton, you are right.

Q. Five, then, you say you had? A. Yes, sir.

Q. During the entire year 1945? [160]

A. Yes, sir.

Q. Did you book Stan Kenton in either the Pacific Square or the Mission Beach Ballroom?

A. The Mission Beach Ballroom.

Q. You did. The five name bands that you have mentioned, were they all booked in Mission Beach Ballroom during the year 1945, sir? A. Yes, sir.

Q. Do you know how many name bands were available on the Pacific Coast by all other booking agencies except the Music Corporation of America during the year 1945 and available for booking in the San Diego area?

A. Well, I can only answer that question in this way. I know of Vaughn Monroe, Henry Busse, and another band which they wouldn't use, which was a colored attraction, Duke Ellington.

Q. So that there were, except for Music Corporation of America bands, there were only eight available for booking in the San Diego area during the year 1945?

A. Outside of Music Corporation?

Q. Yes, sir.

A. So far as I know. I don't know what Fredericks Brothers had.

Q. Now, in the band booking business, is there what is known as the Big Three? [161]

A. Sometimes it is called that.

Q. What are they?

A. Music Corporation, William Morris, and General Amusement Corporation.

(Testimony of Ralph Wonders)

The Court: Will you read the answer?

(The answer was read.)

The Court: Gentlemen, I wish you would approach the bench.

(Discussion between court and counsel off the record.)

[162]

Q. By Mr. Christensen: Does General Amusement Corporation have—or, better stated, did it have during the year 1945 enough name bands available to ballroom operators in the San Diego area to properly service a first-class ballroom?

A. Exclusively?

Q. Yes, sir. A. No, sir.

Q. When was your first name band available in the year 1945 to operators in the San Diego area, sir?

A. I couldn't answer that question without checking our records.

Q. Do you recall, or did you have anything to do with a booking of Henry Busse in Mission Beach ballroom, sir?

A. I had nothing to with the booking of it. I was up in San Francisco and Mr. Busse was playing the Palace Hotel, and I knew that Mr. Finley was having trouble getting a band for the opening, so I talked to Mr. Busse at that time about going down there for the opening.

Q. Henry Busse is not one of your bands, is he, sir?

A. No, sir.

Q. In your opinion, sir, is the Missoin Beach ballroom a ballroom which is comparable to the Pacific Square ballroom in the San Diego area?

A. Yes, sir. [163]

(Testimony of Ralph Wonders)

Q. Are you familiar with the manner in which Mr. Finley has operated the Mission Beach ballroom?

A. Fairly so; yes, sir.

Q. And what is your opinion of that, sir?

A. I think it was operated on a very nice scale.

Q. You are acquainted, are you not, sir, with the Trianon ballroom in San Diego?

A. Yes, sir.

Q. Will you describe it to us?

A. The structure of the ballroom or—

Q. It has been characterized here as a second-floor ballroom.

A. The ballroom is on the second floor, but being on the second floor does not necessarily make a bad ballroom. The ballroom on the second floor is a very fine ballroom, very well equipped; and during the time that I was there, it was always kept very clean. I don't know the class of people that went in there. I have never been in there recently at night time, but the ballroom itself is a very nice place.

Q. Would you consider it a large-scale operation as a ballroom?

A. Well, not on the same scale as the Palladium or one of those class places; no, sir.

Q. The Palladium, of course, I think we consider one [164] of the better?

A. That is right.

Q. Or one of the best, is that right?

A. One of the tops; the top.

Q. Would the Trianon be the next scale lower than that, or would it be farther down?

A. I don't know how to scale it. It is a very fine place, a nice ballroom.

(Testimony of Ralph Wonders)

Q. And the capacity there, do you know?

A. Well, the capacity at the Trianon is not as great as the Mission Beach or Pacific Square. It is a smaller ballroom.

Q. Mr. Wonders, we have been using the name or the term "name band." Will you define it for us, sir?

A. Well, my idea of a name band is a band or an organization that is nationally known through records, commercial records, transcriptions. They play one-nighters, do radio broadcasts, either commercially or sustaining, plays the top spots of the country, which demand a very large salary, which, in return, are what is called a boxoffice draw or a boxoffice attraction, makes the name band.

Q. Have you an opinion as to whether or not it is necessary to the successful operation of a first-class ballroom that name bands be available to the operator thereof?

Mr. Doherty: Just a minute: Subject to our standing [165] objection, your Honor, that it is hearsay; that it is not a matter that is subject to proof by an expert witness or expert testimony; incompetent, irrelevant and hearsay.

The Court: Overruled.

Mr. Christensen: You may answer, sir.

A. I would say that the top-notch ballrooms, with a few exceptions, do need name bands. They are not always available to them; but when they can get them, they buy them at what they call "giving it the added punch" to gain momentum of attendance.

Q. A list of bands and band leaders was mentioned here this morning and the question asked concerning as

(Testimony of Ralph Wonders)

to whether or not they are name bands. Let me, as well as I can, repeat that list. I think the first was Henry Busse. Is he a name band?

A. I would consider him a semi-name band.

Q. Tiny Hill? A. No, sir.

Q. Wingie Manoni? A. Wingie Manoni?

Q. I beg your pardon. I stand corrected.

A. No.

Q. Sully Mason? A. No, sir.

Q. Ancil Hill? A. No, sir. [166]

Q. Ada Leonard? A. No, sir.

Q. Shorty Sherock? A. No, sir.

Q. Muzzie Marcelina? A. No, sir.

Q. Chris Cross? A. No, sir.

Q. Eddie Miller? A. No, sir.

Q. Pinkie Tomlin? A. No, sir.

Q. Boyd Rayburn? A. No, sir.

Q. David Willis? A. I don't even know him.

Q. When was the first name band of the G. A. C. available to an operator or operators in the San Diego area during the year 1945, sir?

A. It was sometime after Decoration Day. I wouldn't say the date or the month because I would have to check it.

Q. Will you tell me the name of that band?

A. Frankie Carl. I believe it was Frankie Carl.

Mr. Christensen: You may examine, sir.

Mr. Doherty: Is that all? [167]

Mr. Christensen: Thank you.

(Testimony of Ralph Wonders)

Cross-Examination

By Mr. Doherty:

Q. Mr. Wonders, I don't know what you will testify to, but I hope I can prove some of what I think are matters we all agree on in this case. All members of bands, including band leaders, are members of the American Federation of Musicians, are they not?

A. Yes, sir.

Q. And that has been a practice in existence for quite a few years, many years, in fact?

A. Yes, sir.

Q. And your company, the General Amusement Company, General Amusement Corporation I think is the correct name, have offices in New York and Chicago and here and some other places?

A. Cincinnati.

Q. Cincinnati? A. Yes, sir.

Q. And you do a national business?

A. Yes, sir.

Q. Before you can do any business as an employment agent—and that is the capacity in which you act, is it not?

A. Yes, sir. [168]

Q. Before you can do any business as an employment agency representing bands or band leaders, you must have a license from the American Federation of Musicians?

A. That is right.

Q. And your company has such a license?

A. Yes, sir.

Q. And that is true of every other individual or corporation that makes contracts or purports to represent members of the American Federation of Musicians?

A. That is right.

(Testimony of Ralph Wonders)

Q. Uniform throughout the United States?

A. Yes, sir.

Q. And they prescribe the kind of a contract that shall exist between the employment agent and the American Federation of Musicians?

A. Yes, sir.

Q. They even go so far as to say what you can draw commissions on, do they not? A. Yes, sir.

Q. They say you cannot draw commissions on certain items, and, in a way, tell you what you can draw commissions on? A. Yes, sir.

Q. And your only interest—that is, when I say yours, I mean your fine corporation—the only interest you have [169] in placing bands is as an employment agent or representative? A. That is right.

Q. You counsel with the band leader and advise him a good place to put a band, and you try to give him the best service possible? A. That is right.

Q. And it is your job, is it not, to see that bands and band leaders are given the best type of assignments so that they will get the best compensation that they can, commensurate with your good standing?

A. That is right. [170]

Q. In other words, you wouldn't put a band into a location that you felt might draw in money temporarily but ultimately would hurt the standing of the band, would you? A. I don't think so.

Q. In other words, you look first, as your duty to the band leader, to give him the best service possible?

A. That is our job.

Q. And you always endeavor to do that?

A. We try.

(Testimony of Ralph Wonders)

Q. And commissions are more or less uniform that are paid for the services rendered?

A. All the agencies are entitled to the same commission.

Q. Now, the American Federation of Musicians, the Musicians' Union, prescribe the form of contract that you have between the agency and the band leader?

A. Yes.

Q. In other words, you must take the contract as handed you by the Musicians' Union, and that is the only contract you can have?

A. That is right.

Q. Just as they prescribe it?

A. Right.

Q. And those contracts provide, do they not, that no engagement can be made without the consent and the approval of the band leader? [171]

A. That's right.

Q. And you always get his consent, do you not?

A. On most of the occasions. Sometimes we don't. Sometimes they leave it up to us.

Q. When they leave it up to you, they have told you to go ahead and do it on your own judgment?

A. That's right.

Q. But you have already asked them before you have done so?

A. Yes, sir.

Q. When you say in some instances they don't, you mean sometimes they don't sign the written authorization?

A. That's right.

Q. But you always get their consent before you make any such arrangement?

A. Most of the times.

Q. The band leader reserves the right to deal direct with any balroom, if he sees fit, does he not?

A. They do at times.

(Testimony of Ralph Wonders)

Q. And sometimes they do that without consulting you? A. That's right.

Q. And sometimes against your wishes—

A. Yes, sir.

Q. —and advice, do they not?

A. Yes, sir. [172]

Q. In other words, any ballroom owner that wants a band that your organization has a contract with can go right around you and ignore you, and deal direct with the band leader, if he sees fit?

A. Nothing can stop him.

Q. How? A. Nothing can stop him.

Mr. Doherty: Yes. I don't know, your Honor, and I think it would be just encumbering the record to put in these contracts. They are long typewritten or printed documents, and it seems everybody has agreed as to just what they are. I will keep them in court available at all times, and at any time that your Honor or any juror should indicate they would like to have them, they will be here. They are long documents with a lot of fine print. We will have them available if it is necessary. I had in mind having this witness identify them and offer them in evidence, but apparently there is no issue about them.

Mr. Christensen: I am willing that they be admitted.

Mr. Doherty: I am also willing that they be admitted, but wouldn't it just encumber the record. But if you want them, they are here.

Mr. Christensen: I don't have any reason for having them, but I will not raise any objection.

The Court: There doesn't seem to be any question but [173] what that is a general standardized form of

(Testimony of Ralph Wonders)

contract that is utilized regardless of the agency and regardless of the band.

Mr. Christensen: I believe that is correct, with the only exception that, for example, in the contracts used by Music Corporation of America they have their names printed on them. That is the only difference.

The Court: Do the other agencies also? Do you?

The Witness: We have our name on it.

The Court: Naturally, the agency that is dealing would have its own name there. As I understand it, they are all the same except for that. It just accumulates expense to the litigants to have them in, but if you want them in, you can have them. I wouldn't think it would be necessary.

Mr. Christensen: I don't think it is necessary.

Mr. Doherty: I will have them in court and if a question comes up, we will have them available.

The Court: We will mark them for identification.

Mr. Doherty: Miss Reporter, I am now submitting what is known as a Farm B contract of the American Federation of Musicians as Defendants' Exhibit A.

The Clerk: Defendants' Exhibit A, for identification.

(The document referred to was marked as Defendants' Exhibit A, for identification.)

Mr. Doherty: And as Defendants' Exhibit B, I am offering the Musicians Mutual Protective Association Local 47, A. F. of M., [174] Los Angeles contract, being the contract between the band leader and the agency, such as the General Amusement Corporation, the Music Corporation of America, and so forth.

(Testimony of Ralph Wonders)

The Clerk: Defendants' B.

Mr. Doherty: Those are marked only for identification.

The Court: You are marking those for identification only, Mr. Hooser?

The Clerk: For identification only, yes, sir.

(The document referred to was marked as Defendants' Exhibit B, for identification.)

Q. By Mr. Doherty: Now, Mr. Wonders,—is it Wonder or Wonders?

A. W-o-n-d-e-r-s, Wonders.

Q. Thank you, Mr. Wonders. There is no such thing in this area as bands in the San Diego area? They don't have any prominent name bands that originate and make their headquarters there, do they?

A. In San Diego?

Q. Yes.

A. Name bands, you are talking about?

Q. Bands of some prominence.

A. There are several bands down there, local bands. I wouldn't say they are prominent. It might be in the particular place they have been in they become a little popular in that particular spot. [175]

Q. In other words, you find some place in your broad experience where a band, although not known in New York, will outdraw any band in the country in Oklahoma? Like, for instance, Bob Wills?

A. Well, Bob Wills is one of the top name bands of his calibre in the country, so far as the type of music is concerned.

Q. That is the western type?

A. Yes, sir.

(Testimony of Ralph Wonders)

Q. Don't you find sometimes a band in a local area that will outdraw bands that are paid much higher wages or compensation; in other words, have a strong local following?

A. My experience has been that there are territorial name bands.

Q. Yes.

A. But my experience is when you bring in a top name band, they will outdraw them 20 to 1. There may be an exception to that once in a while, that is right.

Q. In other words, when you bring in Tommy Dorsey, he would outdraw a territorial name band?

A. Yes, sir.

Q. And sometimes that might not happen?

A. Nothing is impossible.

Q. Now, these bands that you have listed and you represent operate throughout the United States, don't they? [176]

A. Yes, sir.

Q. And when they come here, they have to bring their entire staff along, and some one must pay the transportation?

A. That's right.

Q. And that is usually the person who first engages him, is it not? In other words, the first spot you place them in must have them there long enough in order to justify the payment not only of his weekly compensation but also the traveling expenses?

A. Well, that is possible, and then again the man figures, the band leader figures if we can set up a tour for him of so many weeks at Mission Beach, or Pacific Square, or at the Palladium, and so many one-nighters, a radio shot, a guest spot, he spreads his transportation over all.

(Testimony of Ralph Wonders)

Q. In other words, in addition to his fixed compensation he adds on a pro rata share for his traveling expenses?

A. He figures on so much for so many miles.

Q. And there is no place in Los Angeles where you can just press a button and get any band you want?

A. No, **sir**.

Q. The band has to be arranged for in advance?

A. Yes, **sir**.

Q. Sometimes 60 or 90 days in advance?

A. Yes, **sir**.

Q. And possibly even longer than that? [177]

A. That's right.

Q. In other words, if you know a band is playing in New York, or Chicago, or New Orleans, and you know they have an engagement there, you say, "Can you come to Los Angeles on a certain date? I can give you a certain spot here, another at Santa Barbara, and Fresno, and Sacramento, San Francisco, Seattle and Portland, over a period of six weeks, eight weeks," and so forth, and then he will agree to come? A. That's right.

Q. And sometimes you will book them as long ahead as three or fourth months? A. Yes, **sir**.

Q. It is a great game of showmanship, isn't it, Mr. Wonders, advertising, publicity, personality, and all?

A. It is quite a job.

Q. And this matter of arranging, of rewriting the music, I understood this morning from this talk about arrangements, the arrangements are just printed music?

A. The arrangement is made and from the arrangement the score is written, the arrangement itself copied,

(Testimony of Ralph Wonders)

and that is what the boys play off of, the copy of the arrangement.

Q. The arrangement is something that is printed on some paper? A. Yes, sir.

Q. In other words, it is like a piece of sheet music, [178] and that goes before the band?

A. Yes, except it is arranged for the particular instruments in the band.

Q. They take some well-known selection and rewrite the timing and put in new instruments, and it sounds differently?

A. That's right. Different bands have a different style, and some will take a tune that is a waltz and put it into a fox trot, or something else.

Q. Might take Lohengrin's Wedding March and turn it into something else?

A. That's right. They might take anything.

Q. When you speak of bands being available in the San Diego area in 1945 being just five in number of yours, that didn't mean that you just had five bands in the United States, did it? A. No, sir.

Q. And if you had ample engagements out here, you would have brought more bands into this area?

A. If they could have been made available. They may have had engagements in the other parts of the country so we couldn't bring them out at any price at any time.

Q. Do you have more bands than your competitors in some particular localities?

A. Well, that might be.

Q. It is a competitive business that you are in, is it [179] not? A. Yes, sir.

(Testimony of Ralph Wonders)

Q. You do your best to make a contract, as an employment agency, with various bands and various attractions, and you have competing with you the William Morris Agency, the Music Corporation of America, the Fredricks Brothers Agency, and others?

A. Many more.

Q. And it is a matter of selling? In other words, the man has got his labor and his talent for sale, and you try to bid for it to act as his agent; isn't that the story?

A. Yes. I don't quite understand what you are getting at. Will you repeat it?

Q. Well, it is this: I am a band leader, I render services of a particular and special type, I want an agent to represent me, and I have before me a choice of agencies who are competitors?

A. That's right.

Q. And I choose the one I want?

A. That's right.

Q. No one can force me to choose Music Corporation of America or General Amusement Corporation, or any other company?

A. No, sir.

Q. He uses his own judgment and states who he is going [180] to have represent him?

A. That's right.

Mr. Doherty: I have here a list. I showed this to Mr. Wonders, with your permission, just before 2:00 o'clock and I talked to him just a moment, Mr. Christensen, and I wanted Mr. Wonders to look it over because I do not know which of those numbers on that list his company represents. I am showing you a typewritten list.

Mr. Christensen: May I ask, Mr. Doherty, what does that purport to be, because I don't want to take your time to read it now? What does it purport to be?

(Testimony of Ralph Wonders)

Mr. Doherty: It purports to be, according to what they tell me, a group of bands, and things of that sort, some of which are represented by General Amusement Corporation, and I wanted to have him look it over and call off the names of the bands that his company represents. I haven't the slightest knowledge of it, and I was just going to let him check it.

Mr. Christensen: I think that might save time.

The Witness: It is entirely up to you, gentlemen.

Q. By Mr. Doherty: Would you look at this list and call off the names of the various bands that General Amusement Corporation represents, and did represent in 1945? That doesn't mean now. A. In 1945?

Q. Yes. [181]

A. Mitchel Ayres. Do you want bands, and attractions as well?

Q. You better give bands and attractions also, because you sold both, didn't you? A. Yes, sir.

Mr. Christensen: Just a moment. I don't believe there is any issue or materiality as to attractions.

The Court: I don't believe there is.

Mr. Doherty: Well, there was one, the King Sisters.

Mr. Christensen: Well, I will withdraw it, if it will help any, and would you ask the witness to designate which is an attraction and which is a band?

The Court: Yes, when you give the name just distinguish as between an attraction and a band, if you will, please.

The Witness: Mitchel Ayres, a band. Gracie Barrie is an attraction, a singer. Billy Blair is a band. Harry Bluestone is a violinist who is going into radio now; he does nothing but radio, and he doesn't do ballroom, and

(Testimony of Ralph Wonders)

so forth. Randy Brooks is a band. Bobby Byrne is a band. Frankie Carr is a band. Benny Carter is a band. Lee Castle is a band.

The Court: May I interrupt you a moment? He asked also that you designated those that your company was the agent for.

The Witness: Well, I was only reading what we are [182] agents of.

Mr. Doherty: As I understand, your Honor, he is only calling off those which his corporation represents.

The Witness: Did I say Lee Castle? I don't know whether—I am not sure on Lee Castle. Spade Cooley, a band. Nick Cochrane, a band. Sonny Dunham, a band. Chuck Foster, a band. Ziggy Elman is supposed to have a band, is in the Army and coming out. Harry Gibson is an attraction. Glen Gray, a band. Woody Herman, a band. Eddie Heywood, a band. Jimmy Higson, a band. Roberta Hollywood, a singer or a dancer. Illinois Jacquet, a band. Louie Jordan and his Tympany Five, a band. Stan Kenton, a band. Lloyd LaBrie, a band. Johnny Long, a band. Clyde Lucas, a band. McFarland Twins, a band. Lani McIntire, a band. Jay McShanne, a band. Muzzy Marcellino, a band. Tony Pastor, a band. Don Ricardo, a band. Al Russell, a band, a small band. Miguelito Valdez, a Spanish singer. Joe Venuti, a band. Jerry Wald, a band. Bobby Ramos, a band.

Do you want me to go through the whole bunch, all these papers? I am up to Frederick Brothers now.

Q. By Mr. Doherty: No. Are there other bands that you represent, other than those contained on this list?

A. Oh, yes, certainly.

(Testimony of Ralph Wonders)

Q. Many others? [183]

A. Quite a few others, yes, sir.

Q. This list was just hurriedly prepared and handed to me. Those other bands sometimes, that is, the other bands that you have named, they also perform in this territory.

A. At times.

Q. You wouldn't have a band come out here and perform unless you were asured that it would justify the trip out here, would you?

A. No, sir.

Q. The population is more dense in the East, and the trips are shorter, and you can maybe deal to their better advantages there through your company?

A. That's right.

Q. Now, this matter of name bands is a matter quite in dispute, as to what is and is not a name band?

A. There has been a lot of controversy about it.

Q. A lot of controversy?

A. That's right.

Q. And band leaders that you think are not name bands, they think they are, don't they?

A. I presume every one thinks they are a name band.

Q. Yes. In other words, a band may take a name like the Frank Doherty band, and I am a leader, and I think I am a name band because I have an ad in the paper and an ad on the radio, and some billboards, and a sign on the entrance to the [184] ballroom, and so forth, and I get a crowd coming in, and I think I am a name band?

A. You may think you are, but you wouldn't be. You wouldn't be a name band in my estimation.

Q. Not in your estimation, but in my estimation I would be?

A. That might be possible.

Q. And in the opinion of my musicians we might be a name band because I drew a bigger crowd than most,

(Testimony of Ralph Wonders)

and they think they are a name band; isn't that right?
[185] A. It might be.

Q. So this matter of what is and what is not a name band is a matter of considerable controversy even in the industry, or differences of opinion, I might say, rather than controversy? A. That is possible.

Q. Is that right? A. Yes, sir.

Q. You brought in a conversation briefly about splitting commissions with M. C. A. You say you split commissions on two occasions down there on bands that you put into either Pacific Square or Mission Beach?

A. On two occasions.

Q. Two? A. On two occasions.

Q. Yes. They did not make a demand that the band was not going to be put in there unless you split the commissions, did they? They just wanted a cut on your services? A. Well, I—

Q. I will withdraw the question because it may not be a fair question either way.

The Witness: I can answer it if you like it.

Q. Sometimes in the business you get a split commission with some other agency? A. Yes. [186]

Q. I mean it is not unusual for agencies to split commissions with each other, is it?

A. They do it on occasions. They do not like to.

Q. Did not M. C. A., Music Corporation of America, call on you to place bands in Pacific Square and also at Mission Beach, where they thought your band was the best band in this area to fill that bill? A. Yes.

(Testimony of Ralph Wonders)

Q. In other words, they pushed aside their band and put in yours?

A. I know of one occasion Mr. Bishop took a band out and put one of our bands in, for the simple reason that the band that we had was a much bigger draw and Mr. Daillard should have played it because of that reason, and it was pushed out and ours was put in.

Q. And while Mr. Daillard operated at Pacific Square, you said you placed bands in there, your organization?

A. I have sold a lot of bands and attractions to Mr. Daillard previous and over a period of years.

Q. And you sold bands and attractions out at Mission Beach while Mr. Daillard operated? A. Yes.

Q. Mr. Wonders, you testified you had known Mr. Finley about 18 months—I believe that is correct, isn't it? You met him about 18 months ago? [187]

A. About a year and a half ago I met Mr. Finley.

Q. And you made an engagement or, rather, an appointment for one of your bands to play down in his ballroom, and you demanded a two weeks' guarantee before you would place it there? A. That's right.

Q. And in your business, you keep in touch with people in the ballroom business, do you not? A. Yes, sir.

Q. And you at that time did not have any record of past performances by Mr. Finley in the ballroom business, did you?

A. Well, whether I had a record, I didn't have any record, because I knew that he was running the Trianon ballroom in San Diego, but I had never done business with Mr. Finley and it is customary, the first time you take on a new client, that you check into the situation.

(Testimony of Ralph Wonders)

Q. That is the first time you had booked him for any business? A. Yes, sir.

Q. You are always out looking for new business, aren't you? A. Yes, sir.

Q. And doing your best to place the bands at the most advantageous places? [188] A. That is right.

Q. Did you supply any bands for Mr. Finley in the Trianon? A. Yes, sir.

Q. What type of bands?

A. You might classify as a B band.

Q. That is not higher—

A. Not the top name band; no, sir.

Q. Not the top salary bands? A. No, sir.

Q. Then, there are locations where you have got to use your good judgment as to whether you put in a certain band at one compensation, or a lower scale or a higher scale?

A. Well, I don't think that we use our ideas on that. It is whether the ballroom can stand the top name band, according to its capacity.

Q. That is, when you pay a flat compensation; but when you are paying on a percentage, you would want to know more about the ballroom, wouldn't you?

A. Definitely.

Q. In other words, if you had a flat amount of \$3,000 or \$2,000 or \$5,000 for an engagement, and you had the money up, why, you would go ahead and play any place that was suitable? A. Yes, sir. [189]

(Testimony of Ralph Wonders)

Q. But if you were paying on a percentage, you would want to know where you were placing that band before you put it there?

A. You would want to know the capacity.

Q. The capacity of the floor, yes. A. Yes.

Mr. Doherty: I think that is all, Mr. Wonders.

Re-Direct Examination

By Mr. Christensen:

Q. That question, you said you could answer and Mr. Doherty withdrew it, as I remember, was this: Was any demand made upon you for the splitting of commission by M. C. A. ? Go ahead and answer. What is your answer?

A. My answer was, there was a demand made on me by Stan Kenton's orchestra.

Q. By whom? A. By Mr. Bishop.

Q. One of the defendants in this action?

A. Well, I don't know who is suing who.

Q. What would happen if you did not split the commissions there?

Mr. Doherty: That would be his conclusion, your Honor.

The Court: Yes.

Q. By Mr. Christensen: Were you told what would happen if you did not? [190] A. No.

Q. What did he say to you?

A. Well, we had Stan Kenton on the Bob Hope show; that is a radio program; and with a band of that size and the payroll, we needed more work besides just having the radio show. So that over a period of 39 weeks we had to keep Kenton busy otherwise too, three, four nights a week on one-nighters. We managed to get a picture or

(Testimony of Ralph Wonders)

two, shorts, records. We never could get Stan Kenton into Mission Beach or—pardon me, into Pacific Square.

So Mr. Bishop called me and told me that he would put him in if we would split commissions, and I told him “No.”

Mr. Bishop then got together with Mr. Carlos Castell, who was Mr. Stan Kenton’s manager, and said, “We could give you a lot of weekends at the Pacific Square, if you will have General Amusement split commissions.”

So Mr. Castell came to my office, said he wanted the band in Pacific Square; if we had to split commission, we had to split it. We were in the last couple of weekends of the 39 weeks and we had about run out of our line. We had no place else to go.

He said, “I want the band in there.” Well, I refused to split commissions.

At that time Mr. Rockwell was in town, who is the president of General Amusement Corporation; and he went to [191] Mr. Rockwell and Mr. Rockwell overruled me and told me to split commissions, and the band went in.

Q. And Stan Kenton later played at the Mission Beach ballroom, too, didn’t he? A. Yes, sir.

Q. In the business, booking business, are any sanctions applied by you or any of the other agencies to any of the band leaders who refuse to play where you tell them to play?

Mr. Doherty: Just a minute. I think that would call, your Honor—I object on the ground it calls for a conclusion of the witness as to what “sanctions” means.

Q. By Mr. Christensen: Well, do you do anything to them or hold up bookings or give them poor bookings?

A. If they refuse to play a certain spot?

(Testimony of Ralph Wonders)

Q. Yes.

A. No; there is nothing we can do about it.

Q. Tell me, were Freddie Martin and Stan Kenton name bands in the year 1944?

A. Well, Stan Kenton was on his way up at that time.

Q. Freddie Martin was a name band, wasn't it?

A. Yes.

Q. You have told us that there are comparatively few name bands available to the operators in the San Diego area; particularly, that was true during the year 1945, is that right? [192]

A. As far as we were concerned.

Q. Well, and so far as the other agencies were concerned, too?

A. Well, I don't—I can't answer that question.

Q. You do not know how many Music Corporation of America had?

A. No; I wouldn't have any idea. I could name some bands they had in the territory during the year, but how many, I would not want to attempt to.

Q. You have been asked concerning these contracts with the American Federation of Musicians. Do you know whether the American Federation of Musicians permit an exclusive contract by any booking agency with any ballroom operator?

A. No, sir.

Q. They do not. Do they even permit an exclusive for 48 hours?

Mr. Doherty: Unless this witness is qualified, your Honor, I object on the ground there is no foundation laid.

Mr. Christensen: It is re-direct on the cross-examination, if I might say so, your Honor, with reference to the

(Testimony of Ralph Wonders)

question concerning the American Federation of Musicians' contract.

The Court: If he knows the rules of the Federation. I presume those rules are written rules, usually—

Mr. Warne: They are the best evidence, your Honor.
[193]

The Court: —usually the American Federation of Labor have their activities in writing so that they can be read. I do not know whether they do in this particular. I think they do. I think, from another case that I tried—I am sure that they had regulations of that type in writing.

Mr. Christensen: Very well.

Q. Does the General Amusement Corporation have any 48-hour exclusive booking with any ballroom operator?

Mr. Doherty: I object as immaterial and incompetent.

The Court: Read it again, Mr. Reporter.

(Question read by the reporter.)

The Court: Overruled.

A. No; we do not.

Q. By Mr. Christensen: Would the practical effect of such a 48-hour exclusive booking agency mean that a ballroom operator could monopolize all of the bands available in a particular area?

Mr. Doherty: Just a minute. I object on the ground it calls for the conclusion of the witness, argumentative.

The Court: I do not think it is a matter of expert testimony. That is a factual matter to be developed by proper questions.

Mr. Christensen: Very well. That is all.

Mr. Doherty: Just one question, Mr. Wonders. [194]

(Testimony of Ralph Wonders)

Re-Cross Examination

By Mr. Doherty:

Q. Mr. Ames Bishop, as referred to, is just a salesman for Music Corporation of America, isn't he?

A. Yes, sir.

Q. And the Pacific Gardens (Square) was his account?

A. Yes, sir.

Q. And he just wanted to get some compensation out of one of your bands, didn't he?

A. Probably. I don't know.

Q. How? A. He probably did.

Q. Yes. He wanted you, if you put a band in there, he wanted a cut on your commission?

A. That is right.

Mr. Christensen: That is calling for a conclusion or opinion of the witness there, your Honor, as to what Mr. Bishop had in mind when he demanded it.

The Court: The conversation occurred between the two men. Overruled. He has answered it, I believe.

(Answer read by the reporter.)

Mr. Doherty: That is all, Mr. Wonders.

Q. By Mr. Christensen: Was there any other reason why he wanted you to pay him?

Mr. Doherty: If he knows. [195]

A. I will answer it if you want me to. I don't know of any other reason. I mean he may have had a lot of other reasons.

Mr. Christensen: All right; thank you.

The Court: I wanted to ask you a question or two, Mr. Wonders, on this term "name bands". In your answer to several of the questions, you stated, "We sold

(Testimony of Ralph Wonders)

him" in referring to these name bands. What did you mean by using that personal pronoun "him"?

The Witness: Well, I was referring to the leader, which would be Tommy Dorsey or Woody Herman, because all the leaders are, mostly, with few exceptions on one or two girl bands in existence.

The Court: Well, is the value in the band, in your trade or your profession or art, as you choose to call it—isn't that value in the individual leaders?

The Witness: There are different types of leaders. Some bands are built around a leader with a lot of personality. The leader is the main attraction of the band. In other cases, the band, the leader is an important part of it, but if the band, musically, is great, and outside of being a good instrumentalist, he is not a great personality.

The Court: Isn't the composition of these name bands continuous, or is it the player group, we will call it, as distinguished from the leaders in that chain? [196]

The Witness: I don't quite understand you.

The Court: I presume that a band has a number of instruments in it?

The Witness: The bands will vary anywhere from trios up to 20 or 30 pieces.

The Court: So that is true in the name band as well as any other aggregation of individuals who play instruments to diffuse music; isn't that true?

The Witness: Yes, sir.

The Court: Does the composition of these so-called name bands change? Do the players change frequently?

The Witness: The players in the bands?

The Court: That is right.

The Witness: Yes; they change quite frequently.

(Testimony of Ralph Wonders)

The Court: Well, what is it, then, that makes the band of a business asset excepting the leaders?

The Witness: Well, it is the arrangements, the tunes, how they play them, the style of the band.

The Court: Does the leader make the arrangements?

The Witness: Sometimes and sometimes not. Sometimes he has a crew of arrangers that do all the arrangements. Some leaders are arrangers themselves. The leader, as a rule, will O.K. the arrangement, the final O.K. on it.

The Court: Will that be because of his peculiarities, his artistry, his idiosyncracies, his gyrations, his gymnastic [197] activities?

The Witness: It might be.

The Court: Isn't that the asset that makes him valuable?

The Witness: That is right.

The Court: And that makes his band valueable?

The Witness: That is a part of it.

The Court: That is purely an individual proceeding, isn't it?

The Witness: Well, I don't know how to explain it to you. I mean, for instance, Woody Herman is a vocalist, a very fine clarinet player, and nice personality, sings well; but behind him, with all that, with the great personality—and he is very well liked—he has a wonderful musical organization behind him. In other words, it is to his advantage to build up his organization, and not just to get a C-first, what we call first chairman or first trumpet man or first good pianist. All of those good men in the band help to make him, but help to make it a great organization. He could probably carry on with inferior men for

(Testimony of Ralph Wonders)

a long time, but if he could not deliver the brand of music that he is accustomed to delivery, he would not remain on top.

The Court: Do you classify these name bands in any particular category? For instance, are there name bands in dancing music and name bands in radio music? [198]

The Witness: Oh, yes.

The Court: And so there isn't any general classification in the art or trade or profession or business, or whatever you choose to call it?

The Witness: There may be a top name band on the air that does not even play ballrooms, particularly that we were referring to here, as I understood, was ballrooms. There are certain people on the air, like Andre Castellanas, that never play dance music, but so far as his air programs, he is one of the top musical directors of the air.

The Court: Well, let us take one of those first, not for the purpose of giving anyone any particular publicity, but let us take Ray Noble, for instance. Supposing he was to lead a band at a dance hall, would that draw a crowd?

The Witness: Yes.

The Court: Would you call that a name band?

The Witness: I would say so. Ray Noble has been on the air for a long period of time on the Edgar Bergen show. He not only is on the air musically, but he is on the air reading lines, script.

The Court: Let us take Billy Mills; how would he fit into the designation if he led a band on a dance floor where he was the name band?

The Witness: I could answer that question. I have seen some dates that have been booked on Billy Mills, and he did [199] not draw a tremendous crowd.

(Testimony of Ralph Wonders)

The Court: Would that be because he is not as well known as Ray Noble, for instance?

The Witness: No. I think I can answer that this way: That Billy Mills is not known as a dance band, where Ray Noble, when he first came into this country, came over here with a dance band and opened up on the top of Radio City, one of the finest select restaurants in the country. Ray Noble, in addition to that, has written a lot of very marvelous tunes, himself, which he is known for, which he has recorded; so the kids, or the generation of today know Ray Noble as a dance man.

The Court: It is that element which makes the value, isn't it, the element that you have just described in that language?

The Witness: I would think so; yes, sir.

The Court: Let us take another. Supposing Paul Whiteman was to direct a band in one of these ballrooms, would you classify that as a name band?

The Witness: Definitely.

The Court: And Phil Harris?

The Witness: The same thing.

The Court: Now, isn't it the individual that constitutes the element that, in essence, is the name band?

The Witness: Well, I still say it is what is around [200] him, the elements that lead up to it. I mean with Paul Whiteman, in the case of Paul Whiteman, Paul Whiteman started right here, practically started here, at Denver, or here in L. A.

The Court: Yes; he started here.

The Witness: And he started as a dance band. He was the top dance band of the country for years.

(Testimony of Ralph Wonders)

The Court: Then there are classifications in the art or profession or enterprise—I am not trying to designate it; I am trying to include all the terms that indicate the entity—there are name bands in radio performance, in theatrical performance, in ballroom activities, and perhaps in many other lines of public entertainment, aren't there?

The Witness: Yes, sir; yes, sir.

The Court: Then you could not classify the designation "name band" generally to a commercial entity, could you?

The Witness: No. Even the—name bands, as I have said before, when I was talking about one set of name bands, which we figure there are so many in the top brackets, and which some drop off and new ones come up into—particularly what we were talking about here were ballroom dance bands.

The Court: Would this be a proper designation of what we are talking about: A group of musicians who are playing under the direction of an individual whose name the band takes? [201]

The Witness: If you mean if Paul Whiteman organized a **band**?

The Court: I do not want to mention any particular name. Just read the question. If it is not clear, I will clarify it.

The Witness: It is not quite clear to me, sir.

(Question read by the reporter.)

The Court: Does that fulfill your idea of a name band?

The Witness: Yes, sir.

The Court: And you think that one of the chief elements that go to make up that name band is the indi-

(Testimony of Ralph Wonders)

viduality and artistry and personality, as you would call it?

The Witness: Yes, sir.

The Court: Of the leader?

The Witness: Yes, sir; that has a lot to do with it.

The Court: Whose name the band takes?

The Witness: Yes, sir.

The Court: That is all.

Mr. Doherty: There is one question I overlooked asking. May I?

Q. Who owns the instruments in the band?

A. The individual players.

Q. In other words, the individual musician owns his own instrument? A. Yes, sir. [202]

Q. And wherever he moves across the country, the instrument moves with him just like his coat?

A. Yes, sir; his tool.

Q. What?

A. That is his tool. Without that he could not do his work.

Q. That is the artist's instrument?

A. That is right.

Mr. Doherty: Thanks, Mr. Wonders.

Mr. Christensen: Mr. Wonders, let me ask you a few more questions, then.

Re-Direct Examination

By Mr. Christensen:

Q. In order that a name band be a name band for more than, say, just a very short period of time, it is necessary, is it not, to have more than just a name of an individual standing up on the front of the rostrum?

A. Well—

(Testimony of Ralph Wonders)

Q. There has got to be something behind him, doesn't there?

The Court: Well, that would be obvious.

A. Yes, definitely.

Q. By Mr. Christensen: That has to be an aggregation of musicians that can play together and play the style?

A. Created by the arranger, or whoever it is making the [203] arrangements for the band.

Q. What about the Glen Miller band?

A. The present Glen Miller band?

Q. Yes.

A. Well, the present Glen Miller band which was abroad during the war, directed by Glen Miller, is now back in this country. Glen Miller, as you know, was killed—missing, rather—I am sorry—and the band came back intact and the arranger was still with the band, who has been with Mr. Miller for a long time, a man by the name of Jerry Gray, still making arrangements for the band. A very important personality in that band for many years past, while Mr. Miller was on the Coast, was a man named Beneke, and the Glen Miller band, broadcasting from overseas, did such a wonderful job that when we brought the band back we put the personality of Beneke in front of it. They are on their first engagement now at the Capitol Theatre. They are advertising their Glen Miller band, directed by.

Q. It has continued to be known as the Glen Miller band, even after Glen Miller was no longer with them?

A. That is right.

(Testimony of Ralph Wonders)

Q. It was that aggregation of musicians who played that particular style of music that made that a name band, wasn't it?

A. Yes. You see, they still have all the book of [204] arrangements that went with the band abroad, and passed those arrangements, the book of arrangements were passed right on to this band now, which still remains the same.

Mr. Christensen: Thank you. That is what I wanted to know.

Re-Cross-Examination

By Mr. Doherty:

Q. Your corporation represents that band, does it not?

A. Glen Miller?

Q. Yes.

A. Yes, sir; we have for a number of years.

Mr. Doherty: There was one other question I had a note of, your Honor, that I overlooked. May I ask it?

The Court: Yes.

Q. By Mr. Doherty: When was this conversation by you, in January, a year ago, with Henry Busse at the hotel in San Francisco, respecting an engagement down at Mission Beach? What date in January? In other words, respecting January the 1st, was it immediately afterwards or late in the month, or in December?

A. I don't know exactly. It was while Mr. Busse was playing the Palace Hotel. I could give you almost a reasonable date on it if I could look up when he was at the Palace. I can't say whether it was December or January. It could have been December. [205]

(Testimony of Ralph Wonders)

Q. It might have been in December, 1944?

A. It was whenever he was playing the Palace Hotel. I don't know that date.

Mr. Doherty: Yes. That is all.

The Court: Call the next witness.

Mr. Christensen: Mr. Larry Shea, please.

LARRY SHEA,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Larry Shea, S-h-e-a.

Direct Examination

By Mr. Christensen:

Q. Mr. Shea, your business, occupation or profession, sir, is what?

A. Western Division Manager of Ascap.

Q. Ascap. Let's see; that is the American Society of Composers—

A. Authors and Publishers.

Q. And you have been with that organization for what period of time, sir?

A. Four years in this locality.

Q. And prior to that, sir? A. New York.

Q. For what period of time? [206]

A. About six months. Previous to that, with the Fred Waring's Pennsylvanians.

Q. That is an orchestra? A. Yes, sir.

Q. You have been in the band and entertainment business for what period of time, sir?

A. 1929—17 years.

(Testimony of Larry Shea)

Q. Ascap licenses ballrooms to play music, copyrighted by members of your organization; that is true, is it, sir?

A. Yes, sir.

Q. And is there any different scale of prices or fee—charge, anyhow—depending upon the class of a ballroom?

A. Yes, sir.

Q. Can you tell me, if you are acquainted with the Mission Beach ballroom in San Diego?

A. Very well.

Q. What class ballroom is that? A. "A."

Q. Is "A" the top?

A. The highest; yes, sir.

Q. Do you know what is mean by the term "name bands"?

Mr. Doherty: Just a minute. There is no foundation laid. We object on that ground.

The Court: I think you had better qualify him a little further, Mr. Christensen. [207]

Q. By Mr. Christensen: Do you license on the basis of whether the ballroom plays name bands or semi-name bands or no-name bands?

A. That is one of the factors; yes, sir.

Q. Are you acquainted with the various bands and orchestras playing throughout at least through the West Coast area? A. Yes, sir.

Q. And you have told us you have been in the New York area; and so, may I add throughout parts of the United States would your answer be the same?

A. Yes, sir.

Q. Do you know what is meant by name bands?

A. Yes, sir.

(Testimony of Larry Shea)

Q. Your organization makes such a classification, too, doesn't it? A. Yes, sir.

Q. Will you please tell what a name band is in the ballroom business?

A. Well, a name band is, in Ascap's classification, a musical organization that commands a premium price from the operator of the ballroom, as opposed to what we term a semi-name or a scale band which, unto itself, has an attraction to the public of getting a larger number or group of that public into that particular ballroom, as opposed to [208] another ballroom located across the street that would have everything else that that particular ballroom has in the way of service and refreshments and everything else, except that they had a local scale band.

Q. What are some of the elements or items that you take into consideration in classifying your bands as to whether it is scale, semi or name band? In other words, what makes it a name band?

A. Well, that is—it is not a difficult question to answer. It is one that is very difficult to answer from a standpoint of directly answering. I would have to—oh, I would have to more or less propose a hypothetical case.

A name band is a band which, either through the medium of radio, records, transcriptions, theatre appearances, that is, stage appearances, or a series of one-nighters, as we call them, throughout the entire country has become so popular that if I went into Oskaloosa, Wisconsin and I said to the man in the barber shop there, "I understand Whiteman is going to be on at so and so time tonight," he would know who I meant by Whiteman.

On the other hand, a semi-name band is that band or that type of band, for example, that was formerly rep-

(Testimony of Larry Shea)

resented by a person such as Stan Kenton in this area. I am not giving any factual statements here; I am just merely giving you an opinion. Stan, before he went to New York this last [209] time, was what we would call a semi-name local band. Stan became popular, and nationally popular by virtue of recordings, in my opinion. There was a certain demand for his records over the entire United States. So that I would say that the same barber shop in Oskaloosa, Wisconsin today would be able to recognize what I mean by Stan Kenton.

And on the other hand, we have a lot, particularly a lot of colored combinations in this area, that we regard as semi-name bands in character, and simply because of the fact that they will play at this place, that place and the other place in this particular area; and they, as a result of their appearance in this, that or the other place, will draw a certain following of people from one place to another who follow them.

On the other hand, I could go over to Oskaloosa, Iowa, or I could probably go over to Phoenix, Arizona and say, "Wingy Manone" to somebody and they would not know what I was talking about.

Q. I am glad you mentioned that. Let me see if you can help me with some of these bands that were named here this morning, and see if you can tell me which of them are name bands. Henry Busse?

A. Formerly a top name band; now questionable.

Q. Tiny Hill? A. No name. [210]

Q. Wingy Manone? A. Semi-name.

Q. Sully Mason? A. Sully Mason, no name.

Q. Ansil Hill? A. No name.

Q. Ada Leonard? A. No name.

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Q. Shorty Sherock?

A. Shorty Sherock—oh, no name.

Q. Muzzy Marcellino? A. No name.

Q. Chris Cross? A. No name.

Q. Eddie Miller? A. No name.

Q. Pinky Tomlin? A. No name.

Q. Boyd Raeburn? A. No name?

Q. David Willis? A. I never heard of him. I don't know.

Mr. Christensen: Thank you. You may examine, counsel. [211]

Cross-Examination

By Mr. Doherty:

Q. Mr. Shea, the American Society of Composers, Authors and Publishers is an organization made up of people who make compositions of music, and you represent them, is that it? In other words, a certain person writes a piece of music and gets it copyrighted, and then your organization, if they are a member of it, represents them in licensing that for use on radio, recordings, movie pictures or what not?

A. The small performance rights, sir.

Q. Yes; what is known as the performance rights.

A. Yes, sir; the small performance rights.

Q. Yes. And you collect, of course, fees from the users, whether it is a ballroom or theatre or radio or what not, and you take your percentage out of it and pass it on to the composer?

A. That is a—we take no percentage out of it. We are merely a collection agency for the members of the Society.

(Testimony of Larry Shea)

Q. Do you charge for your services?

A. No, sir; we do not. We are maintained by the members.

Q. On dues?

A. On dues and a regular 20 per cent operating cost of Ascap's. [212]

Q. I said, you take 20 per cent of what you—

A. Well, all right; yes. I mean there is no profit involved as far as Ascap is concerned. It is merely a collection agency maintained by its membership for the collection of small performance rights.

Q. Only substantial compensation to those who run Ascap? A. That is right; surely.

Q. It is not a charitable organization at all, is it?

A. No more than your maid, butler, or anybody else; no, sir.

Q. When you fix rates for radio stations, for instance, you figure in the power of the station, don't you, and the earnings of the station on fixing your rights to be charged for and paid to Ascap? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. In other words, you do not charge all radio stations the same fee?

A. No. We make available to each and every radio station a series of four licenses, any one of which they can accept.

Q. That is depending upon the amount of their income?

A. No; depending entirely upon the amount of their use [213] of our copyrighted music, which is then fixed or determined as the fee which they pay under that particular license agreement.

(Testimony of Larry Shea)

Q. Yes. In other words, the larger that station, like KFI will pay one rate and a smaller station will pay a smaller rate?

A. KFI could pay the same identical rate as KMPR, and there is a very wide difference between KMPR and KFI. If KFI and KMPR both decide to take out, for example, a sustaining license, or a blanket commercial or blanket sustaining license.

Q. I am speaking of a blanket commercial license.

A. Blanket commercial license is based entirely upon the income of power, the wattage of the station.

Q. Coming down to halls, supposing you have the Ambassador out here and Tommy Dorsey plays there; what service or fee do you charge the Ambassador for that performance?

A. That is based entirely. Mr. Doherty, on the size, type, character, location and musical policy of that particular establishment.

Q. Irrespective of who plays in it?

A. No, sir; that is not true. The musical policy incorporates within itself who plays there.

Q. In other words, if they use what you call a B band at the Ambassador one week, are they charged a smaller [214] compensation or fee, charged a smaller compensation by you than if they used what you call an A class band?

A. We have no distinction between A and B in so far as bands are concerned. Whether or not they are name, semi-name or scale?

Q. Yes.

A. We have, in answer to your question, we would charge a higher fee for the appearance of Tommy Dorsey,

(Testimony of Larry Shea)

as you state, in the Ambassador, than we would for Ansil Hill playing there; yes, sir.

Q. And the seating capacity has something to do with that, has it?

A. The seating capacity, the fact that they have a cover charge. I am not trying to give you short answers. I am trying to shape an answer to your question. The only purpose or the only reason that a person would go into the Ambassador Hotel and agree to contract, or to contract, I should say, to pay an admission or a cover charge is because of the fact that they are being drawn there by the attraction that is featured in the Ambassador Hotel. You don't get anything for the cover charge. You pay one dollar for the privilege of sitting down and listening to somebody's music; and consequently, without our music, we feel that that particular attraction would be no attraction, and consequently we make a charge because the Ambassador Hotel, for [215] example, the potential profit is enhanced or increased by the featuring of our members' musical copyrights.

Q. And you fix the fees, your Society, don't you?

A. We fix the fees under the provisions set forth in the United States Copyright Act; yes, sir.

Q. Did the Copyright Act define how much?

A. No, no. I mean that is the basis upon which we are in existence and we—

Q. Do you tell the Ambassador how much they are going to pay you?

A. Indeed.

(Testimony of Larry Shea)

Q. And nobody has any voice in it but Ascap. In other words, the Ambassador takes it or leaves it; isn't that right?

A. Oh, they can either play our music or leave it alone, yes, sir.

Q. Yes. And you fix the fee that the Ambassador pays? A. Yes, sir.

Q. And if the Ambassador don't want to pay it, they don't play your music?

A. In exactly the same manner if you want a box of Post Toasties and you don't want to pay 23 cents for it, then you can get some Kellogg's; in exactly the same manner.

Q. Excepting there is no Kellogg's for sale in competition with Ascap, is there? [216]

A. Oh, yes. There are seven million musical copyrights. Of course, I don't believe that Ascap is the thing in question here.

Q. I agree with you.

A. I am not defending Ascap. There are approximately seven million musical copyrights available to anyone running a commercial enterprise featuring the use of music in it that are not controlled by Ascap.

Q. Aside from Westerns, so-called, would it be possible for any band to play in this community without a license from Ascap?

Mr. Christensen: To which we object as being immaterial to any issue here.

The Court: Overruled.

A. Aside from Western would it be possible?

Mr. Doherty: Western musics—

The Court: Wait a minute. We will have it read.

(Testimony of Larry Shea)

The Witness: Oh, I am sorry.

The Court: We have a reporter.

Q. By Mr. Doherty: Aside from the so-called copyrighted Western music, taking the bands as they are now played in this community, do you know of any band that could perform in any location here without Ascap's license?

A. Not and cater to the musical tastes of the public; no, sir. [217]

Q. Now, the premium price that you say is one of the elements of the name band, the Musicians' Union always prescribes a minimum price to be paid for their musicians; in other words, they cannot play for less; that is right, isn't it?

A. That is what is called "scale."

Q. Yes; that is the scale.

A. Yes, sir.

Q. Then, anything above scale, you begin to get into the so-called semi-name or B-name or A-name bands?

A. Yes, sir.

Q. Depending upon how much above scale they are?

A. Yes, sir.

Q. And your fees are based somewhat on the compensation received, aren't they?

A. No, sir.

Q. I mean into the ballroom? A. No, sir.

Q. In other words, you again say that Tommy Dorsey, receiving a scale of so much per week, that place would not be charged more by Ascap than if Pinky Tomlin played in there?

A. Why, yes, but not by virtue of any knowledge we would take of the difference between the amount to Pinky Tomlin and Tommy Dorsey. That would not enter into

(Testimony of Larry Shea)

it. It [218] is just merely the fact that we establish the fact by popular acceptance of Tommy Dorsey as compared to Pinky Tomlin, which makes Tommy Dorsey a name band and Pinky Tomlin no name band.

Q. That is your determination of that?

A. That is our interpretation. That is all I am giving you.

Q. And your determination is the amount of fees you are going to charge?

A. Yes, sir.

Q. So that when you begin classifying name bands, it is the price scale that you fix for the playing of your music at any particular location?

A. Yes, sir.

Q. You will find others who will disagree with you as to what constitutes a name band, won't you?

A. As to what constitutes a name band?

Q. Yes. You take, for instance, Mr. Kenton; he was classed by you as a local man here, just a B name of a local band in Los Angeles.

A. Semi-name; yes, sir.

Q. Yes. And then he made the hurdle in New York City, and he then became a name band, didn't he?

A. Yes, sir.

Q. Just because he went from Los Angeles and was [219] recognized in New York; that was the fact, wasn't it? He went from one community into another community—

Mr. Christensen: Wait a minute.

Q. By Mr. Doherty: And the mere fact that he was recognized in New York, he was then classed as a name band by your organization?

A. Well, he was accepted by—yes; I—yes.

Mr. Doherty: That is all.

(Testimony of Larry Shea)

Re-Direct Examination

By Mr. Christensen:

Q. There was something else, wasn't there, besides just getting on a train and going to New York City?

A. Well, I think he inferred that fact, that he went to New York City, came about as a result of his popularity out here. There was a demand for him in New York City which a booking agency recognized, or he did, and brought him into New York City. He was a success in New York City.

Q. Why? Was there a demand, do you know, in New York?

A. Because of his popularity out here.

Q. And he is the man, you say, made all the records there, too?

A. He didn't make them there. He made them here, but his records have become extraordinarily popular, I would say, within the last 15 months.

Mr. Christensen: That is all, thank you. [220]

The Court: I think we will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition.

(Short recess.) [221]

Mr. Christensen: You Honor, I would like to recall Mr. Wonders to ask him a couple of questions which were just brought to my attention.

The Court: Very well.

Mr. Christensen: Mr. Wonders, will you please resume the stand?

RALPH WONDERS,

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Mr. Christensen: Mr. Wonders, you have already been sworn, if you will just be seated.

The Court: Sit down, Mr. Wonders.

The Witness: Thank you.

By Mr. Christensen:

Q. During the recess there was brought to my attention a matter of an Artie Shaw incident, where he played out here, he was booked out at the Palladium, and you represented him. Or, did you represent him, do you know? I mean at the Palomar.

A. We did at that time. We don't at the present time.

Q. Now, at that time while he was booked there, he didn't play there, did he? Just tell us what happened on that [222] occasion.

A. Artie Shaw—

Mr. Doherty: Now, just a minute. Give us the date and the approximate time, please.

The Court: Just fix those dates, Mr. Wonders.

The Witness: Gosh, that is difficult.

Mr. Doherty: I didn't get that.

The Court: He said that he has some difficulty in fixing the specific dates. If you can get the dates, you might do that.

Q. By Mr. Christensen: The first time he came to the Coast?

A. I don't know, but it is practically five or six years ago. I would only be guessing. I can give you the exact date and the exact booking by getting the office or getting the contract out.

(Testimony of Ralph Wonders)

Mr. Doherty: I object on the ground it is too remote and without the issues of the case.

Mr. Christensen: It has only to do with the proposition that it isn't the man that stands up there, but various other items, your Honor.

The Court: There is nothing before the court.

Q. By Mr. Christensen: You recall, then, when he was brought to the Coast?

A. I booked him into the Palomar at 3rd and Vermont [223] before it burned down, and Mr. Shaw was taken sick on the train coming out. He opened on a Wednesday, and that night we took him off the bandstand to his home, and from there to the hospital, where he was for a period of four or five weeks. He was drawing capacity business in the Palomar, and while Mr. Shaw was in the hospital, on Wednesday, Thursday, Friday, Saturday and Sunday we put Tony Pastor, who is also the same instrumentalist, in front of the band, plays a clarinet. The business at that time did not drop off; in fact, they never missed Artie Shaw until Mr. Winchell on a Sunday night broadcast announced that Artie Shaw was in the hospital dying, and still the crowds continued to come and the band was paid its weekly salary, and when he came out of the hospital he returned to the bandstand.

Q. The condition was the same as if he had been there personally?

A. Yes, even so much so that the management told me nobody asked for refunds at all.

Mr. Christensen: That is all. Thank you.

(Testimony of Ralph Wonders)

Cross-Examination

By Mr. Doherty:

Q. Mr. Wonders, then what you are telling is that in some instances it is the musical organization that counts?

A. Well, I can clarify that situation by these remarks, that Mr. Shaw had been on the air, he had made a lot of records, [224] the public at large on the West Coast had never seen Artie Shaw, and it might be due to some fact, that they didn't even miss him because the boy in front was playing the same instrument that he played when he was there. Tony Pastor took his place, but even after it was announced on the air that Artie Shaw was in the hospital, the attendance did hold up.

Q. The Palomar at that time was the only large dance hall in Los Angeles? A. Yes, sir.

Q. And at that time the population here in Los Angeles City was about a million and a half; is that right?

A. I imagine so. I don't know what the population was at that time. I have read articles in the newspapers that it was a million and a half population.

Q. And that was the old Palomar out at 3rd and Vermont which burned down? A. Yes, sir.

Q. It was quite a popular place?

A. Very popular.

Q. A big attendance, and band after band there?

A. Well, certain bands drew more than others.

Q. Now, sometimes a very good band does not draw so well; you have found that?

A. In certain spots, yes, that can happen.

(Testimony Ralph Wonders)

Q. Sometimes there is other competition that will knock [225] it down? A. Yes, sir.

Q. And sometimes weather makes a difference?

A. The weather is a big element.

Q. And sometimes another attraction will affect it; is that right? A. Yes, sir.

Q. And sometimes you will have here on a Saturday a big football game where you get 100,000 going out to the Coliseum, and that night you may have a good night or a bad night at a ballroom?

A. That is generally a good night.

Q. Everybody is out on the loose that night?

A. Yes.

Q. But if the football game is up at Berkely or Stanford, and it is a big game where U. S. C. goes up there, the contrary is true? A. Not necessarily.

Q. It cuts it down, does it not?

A. Not necessarily.

Q. You don't think fifty or sixty thousand young people leaving here makes a difference in the attendance at local ballrooms?

A. I didn't know fifty or sixty thousand would leave the city. There are other schools here. There is U. C. L. A. [226]

Q. There is a dispute out at U. S. C. about that. Is that not true?

A. Well, I don't belong to either one, so I am neutral on that subject.

Mr. Doherty: That is all.

(Testimony of Ralph Wonders)

Re-Direct Examination

By Mr. Christensen:

Q. Now, there is a Casa Loma orchestra, isn't there?

A. Glen Gray and his Casa Loma orchestra, yes.

Q. Isn't it booked as the Casa Loma orchestra?

A. It was originally booked as the Casa Loma orchestra, but for the past eight years it has been called Glen Gray and his Casa Loma orchestra.

Q. That is even a corporation, isn't it? A. No.

Q. Was it? A. I think it was at one time.

Mr. Christensen: All right. Thank you.

(Witness excused.)

Mr. Christensen: Mr. Dave Dexter, please.

DAVE DEXTER, JR.,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please? [227]

The Witness: Dave Dexter, Jr.

By Mr. Christensen:

Q. Mr. Dexter, I hope you will keep your voice up, and maybe by example I will do so, too. I will try to make it the other way around. What is your business, occupation or profession, sir?

A. Oh, at the present time I am an editor of a music magazine.

Q. And the name of the magazine, sir?

A. It is called "Hollywood Note." It is not out on the stands yet.

(Testimony of Dave Dexter, Jr.)

Q. Prior to becoming an editor of that, what was your business or occupation?

A. Well, it has been in various capacities connected with music, for about—

Q. Well, you tell us your background in music?

A. Well, it runs about fifteen years, I suspect, as a saxophone player, and editor of various trade magazines.

Q. Will you name some of them? Just the trade magazines I am talking about.

A. Well, I edited "Down Beat" in both Chicago and New York for four years.

Q. Tell me what is "Down Beat," in addition to a trade magazine? There may be some of these ladies and gentlemen that are just as dumb as I am. [228]

A. "Down Beat" is a twice-monthly news magazine, devoted to music and musicians, and it is confined to the popular music field. It does not go into the classical scope of music at all. It is strictly dance bands, dance band musicians, singers, and the like. It is read throughout the world, as a matter of fact.

Q. How long were you editor of "Down Beat"?

A. I was one of the editors of "Down Beat" for about four years.

Q. And prior to that, sir?

A. Before that newspaper reporter, writing music news, night clubs, and I have served as manager of Sonny Dunham's orchestra. I have written radio shows for Jimmy Dorsey's orchestra on a coast-to-coast radio hook-up sponsored by the United States Navy, and I have also acted as one of the editors of a magazine known as "Music and Rhythm" in New York.

(Testimony of Dave Dexter, Jr.)

Q. Tell us about that.

A. That was a similar magazine to "Down Beat."

Q. Were you at any time connected with any records or record-making company?

A. Yes, from 1942 up until last August I was here in Hollywood with Capital Records, a regular phonograph manufacturing company.

Q. Have you been connected, then, with the band and entertainment business for how long, sir? [229]

A. Well, I should say from about 1930 up to the present.

Q. That is your whole work, is it?

A. Yes, that is my entire activity, you might say.

Q. Do you know whether there is such a thing as a name band? Does that mean anything to you?

A. Yes, there very definitely is such a thing as a name band.

Q. Will you tell us what it is?

A. But it is very hard to define, because it is hard to draw the line.

Q. In your own way, in your own words, tell us what it is.

A. A name band, I think, as based—the definition of a name band is based especially on its drawing power at the box office. That is what it is based on essentially, because unless a band can attract more customers, more money at the box office than just any other band, well, it doesn't step out, and cannot demand and receive more money for its services.

(Testimony of Dave Dexter, Jr.)

Q. What is it, if you know, that makes up a name band? What is it that goes to make a name band?

A. Well, I think there are many, many factors that make a name band.

Q. Tell me.

A. Well, there is almost an infinite number of factors. There are hundreds of them. [230]

Q. The major factors, will you tell us?

A. Well, No. 1 would be the leader himself. He must have a certain outstanding talent. He not only must have talent, but he must be—he must have a personality that endears him to other people. He gets along with people, and he can go out and hire the best musicians, and they are happy to work for him. He must have very shrewd management. He must also have very wise publicity and exploitation in order to make his name better known throughout the nation.

There are many, many factors that go into making a name band. Probably the most important at this date, 1946, is his activities in phonograph records. That wasn't true too many years ago, but today the record situation is such, the records are so popular with the masses of American people, and so many are sold that a band's best bet to become a big name band and command the absolute top money in theatres and ballrooms is through the medium of making records. Radio broadcasts also enter into it.

Q. Now, what do bands do in order to get this sort of publicity, records, and—well, let's confine it now to radio.

A. Well, there are so many different angles to it. You mean how does the band get on the radio?

(Testimony of Dave Dexter, Jr.)

Q. Yes. Well, now, let us put it this way: would a band try to select places where it could get on the radio? [231]

A. Of course, the band accepts its engagements through an agency, as we heard earlier today. The agency attempts, in selling the band to a ballroom or a night club man, to sell it to a ballroom or night club man who has the facilities of a coast-to-coast radio wire in his establishment.

Q. Is it true that they would even work for less to be on the air there?

A. I think it has been true in the past.

Q. Would it be true, then, that a name band would be one which a person on the street would recognize on hearing the name?

A. No. I wouldn't say that, because it depends upon the person on the street. The person on the street may have no interest whatsoever in music.

Q. Let us say a person that has some interest in music, then.

A. Well, I don't like—

Q. Well, let's put it in another way: Would it be some such comparable situation as a movie star?

A. Exactly.

Q. You say exactly?

A. Exactly, yes. The top band leaders draw just as much fan mail, and they are idolized just as much by the young people as the top motion picture stars and, of course, their incomes are comparable to the top motion picture stars' [232] incomes, too.

Mr. Christensen: Thank you. You may cross-examine.

The Court: Would it be comparable, say, to a baseball player such as Babe Ruth?

(Testimony of Dave Dexter, Jr.)

The Witness: I think in many ways they are similar.

The Court: Or a vaudeville actor or actress on one of the old circuits?

The Witness: Yes. Probably back in the old days they were probably idolized as the band leaders are today.

The Court: Cross-examine.

Cross-Examination

By Mr. Doherty:

Q. Mr. Dexter, were you in the court room when Mr. Larry Shea testified?

A. I was for a few minutes while he testified?

Q. Were you here when he testified what name bands were, gave his definition of a name band?

A. Yes. I think so.

Q. And were you here when Mr. Ralph Wonders testified what a name band was?

A. Yes, I heard Mr. Wonders' testimony.

Q. And were you here when Mr. Zucca testified as to what name bands were?

A. No, I wasn't here then.

Q. Have you ever found any two people who could just [233] agree on what a name band is?

A. Yes, if you name a band.

Q. If you name a band? A. They will agree.

Q. But when you get down to naming the elements that would make a name band, have you ever found two people that agree with you or with some one else's definition of what a name band is?

A. I have never made an attempt to find out.

(Testimony of Dave Dexter, Jr.)

Q. Now, some band leaders, of course, don't know anything about music, is that right,—are not musicians?

A. Well, I wouldn't subscribe to that, no.

Q. Do you know a band leader named Guy Lombardo?

A. I know of Mr. Lombardo, yes.

Q. He is a name band, isn't he? A. Yes.

Q. Do you know whether or not he is a musician, knows anything about music,—has a professional knowledge of music, I mean?

A. He attempts to play the violin, or did for many years.

Q. He did what?

A. He attempts to play the violin, or did for many years.

Q. He attempted to play it. Do you know whether or [234] not George Olsen is a professional musician, has a professional knowledge of music?

A. I know very little about Mr. Olsen. He is not recognized as a great musician.

Q. What about Jan Garber? He is recognized, isn't he?

A. In some circles, I suspect. Mr. Garber is also known as a violinist.

Q. Is he known as a professional musician or as having a professional knowledge of music?

A. I would say at one time he was known as a musician. Not today.

Q. Now, were you active in music circles in high school?

A. About like any high school youngster, I imagine.

(Testimony of Dave Dexter, Jr.)

Q. How?

A. Just about like any high school youngster, I should say.

Q. When did you graduate from high school?

A. In 1931, I think it was.

Q. In 1931? A. Yes.

Q. And were you seventeen years of age at that time?

A. Well, I will have to figure it up.

Q. Tell us when you were born. [235]

A. 1915.

Q. 1915? A. Right.

Q. Then you were sixteen years of age?

A. Yes, sir.

Q. And during the last years, from the time you were sixteen years of age up to the present time you have devoted your life to a musical career, that is, as a professional editor, and so forth? A. I should say, yes.

Q. And did you go any further than high school?

A. Yes. That is why I hesitated a minute ago. I went to the University in order to further my studies, but during all the time I was in the University I concentrated on music and writing. I make no claim to being a musician, please understand. I am an editor.

Q. That is, you never studied music?

A. Yes, I have studied music.

Q. But you don't make any claim to being a professional musician?

A. No. I mean, my livelihood is writing and editing, not playing an instrument.

Q. You were speaking about these coast-to-coast broadcasts as one of the important factors in defining a name

(Testimony of Dave Dexter, Jr.)

band. Isn't it very important to know what hours the broadcasts take [236] place?

A. Well, for whom, the average listener?

Q. For the musician. Does it make any difference what hour of the night he broadcasts, as to whether or not the coast-to-coast broadcast amounts to anything?

A. Certainly. It varies according to whatever portion of the country he is in.

Q. In other words, there are a number of places in Southern California that broadcast coast-to-coast dance bands after 11:00 o'clock at night?

A. They broadcast, but most of the wires don't go coast-to-coast, because most of the stations in the East are closed.

Q. Some are open all night?

A. But very few will carry a sustained program that late at night, at 1:00 o'clock in the morning.

Q. But if you broadcast in Los Angeles at 11:00 o'clock, it is 2:00 o'clock in the morning in New York,—right?

A. Right.

Q. So a coast-to-coast broadcast doesn't mean much unless you know the hour the broadcast takes place; isn't that true?

A. No. I really don't understand your question, Mr. Doherty.

Q. Well, Mr. Dexter, you stated that one of the elements of a person becoming a name band, or an organization becoming [237] a name band, was radio broadcasts coast-to-coast.

A. Yes, sir.

(Testimony of Dave Dexter, Jr.)

Q. Isn't it an important factor to know the hours that the coast-to-coast broadcast takes place, in order to determine whether or not—

A. Yes, but those broadcasts can take place at any time from 12:00 o'clock noon until 12:00 o'clock midnight. You have a 12-hour span there. For instance, I like to know what hour Bob Hope is on on Tuesday nights, so that I won't miss his program. In other words, I don't quite understand. All broadcasts don't have to emanate from Hollywood at 11:00 o'clock at night. They can emanate at 5:00 or 6:00 o'clock in the afternoon just as easily as at midnight.

Q. I am not asking you that. I am asking you whether or not the hour of the broadcast is not also an element?

A. Yes, it is an element.

Q. Now, we will take the matter of recordings. You say that is very important. Sometimes a band leader overnight becomes popular because he makes a recording that catches; isn't that right? A. Right.

Q. And then if that is the last one he makes, he fades about as quickly as he was made, doesn't he?

A. Yes, if he doesn't make any more, his position is in jeopardy. [238]

Q. In other words, he has to make more than one hit, he must keep on producing at reasonable periods additional records; is that right?

(Testimony of Dave Dexter, Jr.)

A. Yes, but there have been exceptions to it.

Q. There may be exceptions, but the general rule is that one record standing alone will not necessarily sustain a band leader over an indefinite period? A. True.

Q. And he must keep on producing? A. True.

Q. Now, the drawing power at the box office. You never check that, do you? You don't know how much these band leaders draw at any specific place, do you?

A. I have a pretty good idea, yes.

Q. Have you ever checked the matter personally?

A. In the past I have had occasion to, yes, when I was reporting certain news stories that dealt with the box office draw of attractions.

Q. Well, haven't you found instances where band leaders are pretty well known in one locality, and they go into another locality and are complete flops?

A. That has happened, yes. Again, it depends on his records, his air time, his management, the weather. Many, many factors determine it.

Q. As you said, there may be a hundred different factors [239] involved? A. Yes.

Mr. Doherty: That is all.

Mr. Christensen: That is all. Thank you very much.
(Witness excused.)

Miss Katleman, please.

ISABEL KATLEMAN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Isabel Katleman, K-a-t-l-e-m-a-n.

The Court: And is it Miss or Mrs.?

The Witness: Mrs.

By Mr. Christensen:

Q. Your business, profession or occupation is what?

A. I am a secretary at Frederick Brothers Agency.

Q. And Frederick Brothers Agency is what?

A. It is an artists' agency similar to those which have been under discussion during this trial.

Q. Such as Music Corporation of America,—

A. Yes, sir.

Q. —and General Amusement Corporation?

A. Yes.

Q. In your capacity as secretary, will you tell me your [240] specific duties there?

A. Well, I am secretary to two men, Mr. Billy McDonald of the orchestra department, and Mr. Tom Kettering of the acts department. In that capacity I take care of their telephone calls, and correspondence, and just general office routine.

Q. Well, do you also do some booking?

A. Not with this office, no. I have been there a very short time.

Q. How long have you been there?

A. Since the first of November, of 1945.

(Testimony of Isabel Katleman)

Q. Prior to that time where were you employed?

A. With the William Morris Agency in Beverly Hills.

Q. Now, the William Morris Agency is another agency similar to those under discussion; is that right?

A. Yes.

Q. As a matter of fact, that about exhausts them, does it not, the William Morris Agency, the Fredericks Brothers Agency, the General Amusement Corporation and the Music Corporation of America?

A. Well, those are the only large ones. There are numerous small, independent agencies.

Q. At the William Morris Agency, what were your duties there?

A. Well, I was fundamentally the same, except I had a [241] little more responsibility, having been there a longer period of time in the orchestra department.

Q. Will you explain your duties? Just explain what your duties were while you were at the William Morris Agency?

A. Well, I was secretary to three different men during their period of tenure there, the last being Charles Wick, who now holds the position as head of the band department, and I did practically the same thing, office routine pertaining to orchestras.

Q. While there did you book any bands?

A. Yes, I did.

Q. Frequently?

A. Well, it depended. Jack Flynn, who had the position before Mr. Wick, was out of the city a great deal, during which time I would handle his affairs, and I also assisted Mr. Wick, because he was unfamiliar with the territory when he took over the job.

(Testimony of Isabel Katleman)

Q. So that you would carry on the activities during Mr. Flynn's absence— A. Yes.

Q. —and book bands; is that right? A. Yes.

Q. Will you tell me how those bookings were handled?

A. You mean the general procedure in booking an orchestra? [242]

Q. That is right. Just briefly tell us how.

A. Are you interested in one-nighters or locations? They vary somewhat.

Q. Tell me about those.

A. In one-nighters, when you know a band is coming into the territory, you send out a series of form letters to ascertain the interest of the various promoters in your territory. You then get that particular interest and send out telegrams with definite dates, and follow through with a telephone call to the promoter, as a general rule, and if a booking is consummated, telegrams are sent by the promoter and by the booking agency, and the contracts are issued and signed.

Q. Do all those letters and telephone calls go only to places here in California?

A. No, they cover our entire territory; about seven western states, I believe, roughly.

Q. Before working for the William Morris Agency, by whom were you employed?

A. Music Corporation of America, in Beverly Hills and San Francisco.

Q. That is the defendant in this action, the Music Corporation of America? A. Yes.

Q. What was your position with the Music Corporation of America? [243]

A. I was secretary to Ames Bishop.

(Testimony of Isabel Katleman)

Q. Now, will you fix the time during which you were so employed?

A. From July, 1941 until January, 1943.

Q. During the time that you were there, did you have any conversation with Mr. Bishop concerning a contract with Wayne Daillard?

A. Well, Yes.

Q. Tell me what that was.

A. Oh, possibly three or four months after I had commenced working there and was learning the music business we discussed the fact that M. C. A. was booking the Pacific Square Ballroom.

Q. By "we" you mean you and Mr. Bishop?

A. Mr. Bishop and I were.

Q. That is one of the defendants here?

A. Yes.

Q. Tell me what was said.

A. Something to the effect that there was an exclusive booking arrangement with Pacific Square, and I had been reading the by-laws of the American Federation of Musicians to familiarize myself with the business. I knew nothing about it, and I had recalled a phrase stipulating that no agent could book exclusively. And he said or intimated—

Q. Who said? [244]

A. Mr. Bishop intimated there were—

Mr. Doherty: Just a minute.

By Mr. Christensen:

Q. Instead of intimated, what did he say or do?

A. I am sorry. He sort of smiled and said, "Well, there are ways of getting around that" to be exact.

(Testimony of Isabel Katleman)

Q. That is the Wayne Daillard contract with Music Corporation of America that he was discussing?

A. Yes.

Q. You know Mr. Finley, don't you? A. I do.

Q. How long have you known him?

A. I have known him personally a little over a year. I have known him by reputation for about five years.

Q. Have you been down to the Mission Beach Ballroom?

A. Yes, I was there the week-end when they opened last February.

Q. You also have been down to the Trianon Ballroom, I believe? A. Yes, I have seen it.

Q. While you were at the William Morris Agency, did you have occasion to write a letter for Mr. Finley?

A. Yes, I did.

Q. That was to the City Council of the City of San Diego, was it?

A. No, it was a letter to Mr. Finley. [245]

Q. Concerning the booking; is that right?

A. Concerning orchestras which we had available.

Q. And what was the letter?

A. You mean, what it contained, or the circumstances under which it was written?

Q. Well, both. Tell us.

A. Well, Mr. Finley called the office, and spoke with me, said that he was attempting to get the lease for the Mission Beach Ballroom, and to do so he would have to prove he was able to get attractions. He wanted to know if we would furnish him with a letter giving

(Testimony of Isabel Katleman)

a list of our orchestras so that he could submit it to the City Council, to enable him to get the lease.

Q. You did that?

A. Yes, I did. I wrote the letter, signing Jack Flynn's name, and when he came in he approved the letter and signed it himself.

Q. After you had written and sent or given this letter to Mr. Finley, did you then hear from the defendants, or any of them?

A. Yes, sometime afterwards they called Mr. Flynn.

Q. Who called? A. Mr. Bishop.

Q. You know Mr. Bishop's voice, of course?

A. Yes, over a period of almost five years.

Q. And did you hear the conversation?

A. Yes. I listened in on all of Mr. Flynn's telephone calls because he was away from the office a great deal, and I had to familiarize myself with what was going on, and he told us at that time that—

Q. Who?

A. Mr. Bishop. I am sorry. He informed us that Mr. Finley had not obtained the lease for Mission Beach, and would we please write a letter to Mr. Dailard retracting our original letter to Mr. Finley, saying we would continue to do business with Pacific Square through Mr. Bishop, and Mr. Flynn refused to do this?

Q. What did he say?

A. He said, "I intend to do business with whomever I can in San Diego. We don't like the situation which has existed there of splitting commissions," and he refused to write the letter. That was all.

(Testimony of Isabel Katleman)

Q. Now, while you were with Music Corporation of America, will you tell us if the system of booking bands was the same as you have already described?

A. You mean the letters and telegrams, and so forth?

Q. Yes.

A. Yes, all the offices follow the same procedure, to a great extent. M. C. A. does it on a greater scale because they have more attractions, but it is primarily and fundamentally [247] identical everywhere.

Q. Tell me about a contract. For example, let's start off with, say, there is a band in the East that is coming out west. Where does the territory of the Beverly Hills office begin?

A. Oh, about—

The Court: Of which organization?

Mr. Christensen: The Music Corporation of America.

The Witness: Oh, for them, I believe that they cover Denver west.

Q. By Mr. Christensen: I beg your pardon?

A. Denver west.

Q. Now, then, let's take a band that is, let us say, arbitrarily and for the purpose of illustration, assume the band is in Chicago and coming west, and let us say going northwest. Now, tell us just how that is handled.

A. Oh, you would telephone or wire your one-night booker in Denver and set up a day there, or a week if the place is large enough and can afford the band, and then take it up into Salt Lake, Butte, Seattle, into Canada, if necessary, and on down the Coast.

(Testimony of Isabel Katleman)

Q. How do you go about making these agreements? Is it all by telephone?

A. A great deal of it is. Your telephonic confirmation is not binding, so it must be by wire. [248]

Q. So you send them a telegram; is that right?

A. Yes.

Q. At M. C. A. they also have a teletype?

A. They did not at that time. They may now. I don't know.

A. And how are the contracts gotten to the orchestra and to the ballroom operator, and how is that handled? A. By mail.

Q. How about remittances? Do they come in by mail, or what?

A. By mail generally, or if the time is short and they want a deposit, it may be telegraphed, although that is not very usual.

Q. You were engaged in this business while Mr. Daillard had the Pacific Square Ballroom, were you not? A. Yes.

Q. And did the William Morris Agency book some bands in there? A. Yes; yes.

Q. What was done in order to do that?

A. Mr. Flynn or Mr. Wick, as the case may be, would call Mr. Bishop and say, "I have, oh, Henry Busse or Vaughn Monroe available on the 8th of January. Is there a spot down in San Diego?"

And Mr. Bishop would say, "I will pencil it in, and let [249] you know." Then they would talk money, and the greater part of the time it was confirmed. However, commissions had to be split, and our own contracts

(Testimony of Isabel Katleman)

were issued and sent over to Mr. Bishop, who sent them to Mr. Daillard. Mr. Daillard sent them back to Mr. Bishop, and he sent them to us. [250]

Q. So that, in order to book a band into any place that was run by Daillard, it was necessary to go through Bishop, is that right? A. Yes.

Mr. Doherty: Just a minute now. That calls for the conclusion of the witness and argumentative and hearsay.

The Court: Yes, that is a leading question. Don't lead your witness.

Mr. Christensen: Well, let me reframe it.

Q. In order to book one of William Morris Bros.' bands into either the Pacific Square ballroom or—let's limit it to that—what was necessary to be done?

A. To consummate the booking through Mr. Bishop.

Q. And did you say something about splitting commissions, too? A. Yes.

Mr. Christensen: All right; thank you. You may examine, Mr. Doherty.

Cross-Examination

By Mr. Doherty:

Q. When did you go to work for Music Corporation of America, in 1941? A. Yes.

Q. You worked for them about 18 months?

A. Approximately. [251]

Q. And you are Mr. Bishop's secretary?

A. I was.

Q. You were? A. Yes.

Q. And then you went to the William Morris Agency?

A. There was about a six months' hiatus there.

(Testimony of Isabel Katleman)

Q. Pardon me?

A. There was about a six months' hiatus there. I was in San Francisco and I returned to Los Angeles in June of 1943, at which time I went to William Morris'.

Q. You are an experienced booker of bands, aren't you?

A. Yes. I know the agency band booking business thoroughly.

Q. Yes. And, of course, you know what name bands are? A. Yes; I do.

Mr. Doherty: I show you, counsel, a photostat copy of a letter, a photostat of an original which is part of a deposition.

Mr. Christensen: I have seen it, Mr. Doherty. Thank you for having shown it to me.

Mr. Doherty: May that be stipulated that is a photostat of the original?

Mr. Christensen: Oh, yes; certainly.

Q. By Mr. Doherty: I will show you, young lady, a letter dated September 13, 1944, addressed to Mr. Larry Finley [252] at San Diego, signed by "Jack Flynn." It is on the stationery of the William Morris Agency. Is that the letter that you wrote?

A. Yes. It has my initials on it.

Q. And this is the letter that Mr. Jack Flynn signed after you had prepared it for him?

A. Yes. He came into the office; I told him of the phone call, showed him the letter and he signed it.

Q. In that letter, the list of bands, name bands of William Morris Agency, the William Morris Agency had

(Testimony of Isabel Katleman)

more bands than that, of course, under contract, didn't they?

Mr. Christensen: Just a moment, please.

A. Many more.

Mr. Christensen: To which we object as assuming a fact not in evidence. The letter says:

"A partial list of our attractions," not of bands.

Mr. Doherty: Well, I will introduce the letter, first, and I can examine the witness on it more intelligently. Any objection to introducing this as Exhibit C?

Mr. Christensen: No, Mr. Doherty; I have none.

The Court: So ordered.

(The letter referred to was marked as Defendants' Exhibit C, and was received in evidence.)

Mr. Doherty: May I read it to the jury, your Honor? [253]

This is a letter on the letterhead of the William Morris Agency, 202 N. Canon Drive, Beverly Hills, California, dated September 13, 1944.

"Mr. Larry Finley

"718 Bank of America Building

"San Diego, California

"Dear Mr. Finley:

"Pursuant to our telephone conversation of today, if you complete your plans to take over the Mission Beach Ballroom in San Diego, we should be happy to arrange our various name bands for appearances with you when they are available in this territory.

(Testimony of Isabel Katleman)

"A partial list of our attractions include:

"Georgie Auld	Neil Bondshu	Henry Busse
"Count Basie	Del Courtney	Al Donahue
"Al D'Artega	Billy Eckstine	Earl Hines
"Duke Ellington	Enric Madriguera	Hal McIntyre
"Vaughn Monroe	Ozzie Nelson	Boyd Raeburn
"Carl Ravazza	Artie Shaw	Freddie Slack

"Paul Whiteman

"I'd appreciate your calling me when you are in Los Angeles so we can discuss your policy further and at that time I can possibly give you tentative dates when the above orchestras will be available.

"Cordially,

"(Signed) Jack Flynn

"William Morris Agency, Inc." [254]

Q. Now, young lady, look that list over and tell me the names on there that are so-called attractions and not bands. A. Those are all orchestras.

Q. Those are all orchestras? A. That is right.

Q. But the William Morris Agency has more than that under contract, has it not?

A. Yes; many more.

Q. Many more? A. Yes.

Q. But this was all that was available, coming on the Coast about that time, is that it?

A. No. Those were the name bands on the available list of attractions.

Q. That were coming out here?

A. Not necessarily, no. It was the complete list of name bands.

(Testimony of Isabel Katleman)

Q. This is not a complete list?

A. This is not a complete list of orchestras whom they have under authorization; no.

Q. Were you in the room here, in the courtroom, when a couple of gentlemen testified, Mr. Larry Shea and Mr. Ralph Wonders, about what were and what were not name bands? A. I was. [255]

Q. What? A. Yes.

Q. You are an expert on that, aren't you?

A. I do not believe I rank with them, but I have my own ideas on name bands, and they are conclusively the same as everyone else has said.

Q. Young lady, you think, don't you, in the same places?

A. No. Any name band is that which is known nationally.

Q. You heard them say that Boyd Raeburn was not a name band, didn't you? A. I did.

Q. And you find on this list that you represent Boyd Raeburn was a name band?

A. Boyd Raeburn, Mr. Doherty, was William Morris attraction and we had to call him a name band.

Q. You would not deliberately misrepresent anything to Mr. Finley, would you?

A. Well, we still have hopes that he may be. He is a name band—I would like to amend that—to a certain group of young people who like him tremendously; but he has yet to attain nation-wide recognition.

(Testimony of Isabel Katleman)

Q. Then, you have another qualification on name bands; you have a name band for the young folks, some for the middle-aged, and some for the old, do you?

A. No. No, I was just amending that in the case of [256] Mr. Raeburn.

Q. How many conversations a day would Mr. Bishop have on the—or, rather, Mr. Flynn have on the telephone?

A. Oh, that is very hard to say; possibly 25, 30, 35.

Q. And you listened in to all the conversations?

A. I did unless they were personal.

Q. Every conversation that he had you would listen in on? A. Yes.

Q. Unless they were personal? A. That's right.

Q. Was he in a different room from you?

A. No; we shared an office.

Q. The same office? A. Yes, sir.

Q. How far was he seated from you?

A. About the same distance as you and I.

Q. And that is about a distance of 10 to 15 feet?

A. Approximately.

Q. How could you tell the conversation was going to be personal so that you might not listen in?

A. Well, all calls came through me. I answered the telephone, and if it was a personal call I would not listen. I knew who was calling, who was a personal friend and who was a business acquaintance. [257]

Q. And you listened in on this conversation of Mr. Bishop from San Diego to Mr. Flynn?

A. Mr. Bishop was calling from Beverly Hills, from his office.

(Testimony of Isabel Katleman)

Q. Calling from Beverly Hills? A. Yes.

Q. You were also in Beverly Hills, were you not?

A. Yes.

Q. Did you make any note of that conversation at the time?

A. No; I never made notes of conversations. I listened so that I would be apprised of what had happened.

Q. You had conversations, then, of 20 or 25 a day that you would listen in, which would be an average of, say, 100 a week, and you now remember that back in 1941 a certain conversation took place and in 1944 another conversation took place?

A. Those were peculiar incidents which caused me to remember them.

Q. Just a peculiar incident. How did you come to relate the substance of this conversation to Mr. Finley?

A. I don't understand.

Q. This conversation now you are testifying about that Mr. Ames Bishop had on the telephone with Mr. Flynn, how did you come to relate that conversation to Mr. Finley? [258]

A. Oh, I called Mr. Finley and I said I was sorry to hear he had not gotten the lease. And then Mr. Flynn got on the telephone and said—he also repeated that he was sorry, because we were both very fond of Mr. Finley—pardon me—and we were hoping that he would be successful. He seemed to want to go into business in San Diego on a larger scale, and he seemed to be exceedingly surprised, and said, “No, the trial doesn't come up until next week, or the hearing, whatever it was.”

(Testimony of Isabel Katleman)

Q. Didn't Mr. Bishop say to you on the telephone that he wanted Mr. Flynn to write a letter to San Diego in behalf of Mr. Daillard so Mr. Daillard would get the lease? A. He did.

Q. Well, you knew from that conversation that the lease had not been awarded? A. No.

Q. That Mr. Daillard was trying to get it?

A. I am sorry, Mr. Doherty. Mr. Bishop led us to believe that the hearing had been held a week previous to what we had expected, and that Mr. Finley had been refused the lease and Mr. Daillard had it, and therefore we should endeavor to get back into Mr. Daillard's good graces.

Q. Well, the letter was to be written to the City Council, wasn't it?

A. No; there was never a letter written to the City [259] Council.

Q. No. But Mr. Bishop asked a letter be written to the City Council on behalf of Mr. Daillard?

A. I don't recall it as such. He wanted the letter written to Mr. Daillard. That was my impression.

Q. You mean commending Mr. Daillard as a desirable lessee for the Mission Beach?

A. No; more retracting a letter which had been written, with the thought shown that we shall give you our business in the future, as we have done in the past.

Q. You have no very definite recollection of it, have you?

A. Not too definite; merely the sum and substance of the conversation. I couldn't repeat it word for word.

(Testimony of Isabel Katleman)

Q. And Mr. Finley has helped to refresh your recollection; he told you what he remembered you saying?

A. No; he has not.

Q. You have not talked with Mr. Finley in the last two or three weeks? A. I have seen him, yes.

Q. You have not talked to him about the testimony you were to give here? A. No; I have not.

Q. You have not talked with his attorneys?

A. No. [260]

Q. You mean you have not talked with any of the attorneys for Mr. Finley before coming to this courtroom during the past two or three weeks?

A. I have spoken with them. I passed the time of day with them; yes.

Q. And they did not know what you were going to testify to until you came here on the stand?

A. They did not, to my knowledge.

Q. Isn't it a fact that you gave a statement and it was taken down in shorthand, which counsel read from right here in your presence?

Mr. Christensen: Do you want to see it, Mr. Doherty? It is some hieroglyphics that I made here, if you really want to see it.

Mr. Doherty: I don't want to see it.

Mr. Christensen: Why don't you, instead of asking her?

The Court: Never mind, now. I don't want that between two counsel.

The Witness: I don't know what you mean about the stenographic report.

(Testimony of Isabel Katleman)

Q. By Mr. Doherty: Who did you talk to about what you were going to testify to here today, before you came to this courtroom? A. No one.

Q. No one? [261] A. No.

Q. And the questions that this fine gentleman, Mr. Christensen, asked of you were without going over the matter with you as to what the answers were going to be?

A. Mr. Christensen and I have not discussed anything that we have talked about here on the stand.

Q. Or Mr. Finley? A. No.

Q. Or any other attorney representing Mr. Finley?

A. No, sir.

Q. Or any other person representing Mr. Finley?

A. No, sir.

Q. You have had no such talk with anybody?

A. I have not.

Mr. Doherty: That is all. I might submit another piece of evidence here, your Honor, and clean up some of this evidence here.

Mr. Christensen: I have not seen this. Will you give me just a minute, please?

Mr. Doherty: That is Fredericks Bros.

Mr. Christensen: If she knows anything about it, I have no objection.

Q. By Mr. Doherty: I will show you a letter on Frederick Bros. Agency stationery, dated September 14, 1944, and ask you if you recognize that signature? [262]

A. That is Billy McDonald's signature; yes.

(Testimony of Isabel Katleman)

Q. Yes. And did you ever see that letter?

A. No. I was not working for that office at that time and I have not gone through their files; so I am not familiar with that.

Dr. Doherty: May it be stipulated that this is the letter Frederick Bros. Agency wrote Mr. Finley in September, 1944?

Mr. Christensen: Will you hold it until tomorrow morning? We are about to adjourn. I did not read it very carefully. Will you do that for me, please? You might mark it for identification.

Mr. Doherty: Mark it Defendants' Exhibit D for identification.

(The letter referred to was marked as Defendants' Exhibit D, for identification.)

Do you wish to adjourn now, your Honor.

The Court: Yes; I think so.

Mr. Doherty: Will you have the witness return, then, tomorrow morning?

The Court: Return in the morning.

The Witness: Yes, sir.

The Court: Ladies and gentlemen, we will take a recess until ten o'clock tomorrow morning. Remember the admonition and keep its terms inviolate. Be here at ten o'clock in the [263] morning.

(Whereupon, an adjournment was had until 10:00 o'clock a. m., Thursday, January 31, 1946.) [264]

Los Angeles, California, Thursday, January 31, 1946.
10 A. M.

The Court: All present. Proceed.

Mr. Doherty: I think this young lady was on the stand.

ISABEL KATLEMAN,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

Mr. Doherty: If the court please, just as we recessed last night I had shown to counsel a document which we have had marked Defendants' Exhibit D for identification. This morning I showed it to counsel. What is your pleasure about it?

Mr. Christenson: I have no objection.

Mr. Doherty: It may be introduced?

Mr. Christensen: Yes.

Mr. Doherty: May we introduce it, then, as Defendants' D?

The Court: So ordered.

(The document referred to was marked as Defendants' Exhibit D, for identification.)

Mr. Doherty: May I read it to the jury, your Honor?

The Court: Yes.

(Testimony of Isabel Katleman)

Mr. Doherty: This is the letter I referred to yesterday, just as we adjourned. It is on the stationery of Frederick Bros. Agency, Hollywood, 8564 Sunset Boulevard, dated [266] September 14, 1944.

“Mr. Larry Finley
#718 Bank of America Bldg.
San Diego, California

“Dear Larry:

“As per our recent phone conversation wherein you stated that there was a possibility of your leasing the Mission Beach Ballroom, I am herewith listing some of our attractions that would be available for your use in the near future. I would like to say and remind you again that should this happen we can supply you some of the greatest name attractions in America today and naturally, we would like to do it on an exclusive basis and by our having your place exclusively, you could be assured of nothing but the finest talent in the business.

“The following is a list of the orchestras that would be available for your place:

“Lawrence Welk and His Champagne Music;

Ina Rae Hutton and Her Famous Orchestra:

George Paxton, 23 piece band breaking records
Roseland Ballroom, New York;

Milt Britton, world's greatest comedy and dance band;

Ray Herbeck and His Columbia Recording Romance
and Rhythm Orchestra;

Ada Leonard and Her All American 18 Piece Great
[267] Orchestra.

(Testimony of Isabel Katleman)

Tommy Reynolds, America's Young 'Swing King';

Anson Weeks, famous 'Let's Go Dancin' With Anson' Orchestra;

Carlos Molina, just closed sensational 16 week engagement Palace Hotel San Francisco;

Col. Manny Prager, ten years on Ben Bernie's show;

Don Reid Orchestra, now in 9th month at Trianon Ballroom, Chicago;

Pinky Tomlin Orchestra;

Phil Levant Orchestra;

Billy Bishop, now Aragon Ballroom, Chicago.

"Also we have in colored bands:

Fletcher Henderson's World Famous Orchestra;

Ernie Fields' Okey Recording Orchestra;

The 18 International Sweethearts of Rhythm.

"The foregoing is a partial list of some of our larger names and when the time comes, I can give you many more to choose from.

"Also, I am listing a few of the names that will be available to you:

"Willie Howard

Rufe Davis

Ella Mae More

Belita

Bonnie Baker

The Condos Brothers

Fifi D'Orsay

Judy Starr

Dorothy Donegan

Ida James

"Larry, I hope the above list which is only a partial [268] list of the artists we represent exclusively, will supply the information you need. You, of course,

(Testimony of Isabel Katleman)

realize we are one of the four largest agencies in the business today and the above is only a partial list of the attractions we can offer you when the time warrants.

"I am looking forward to seeing you again in the very near future and I hope and know as always your business venture will be a great success.

"If there is any added information you need as to our available talent, please do not hesitate to call upon me as it would be a pleasure to be of service to you.

"Sincerely, Billy"

and typed, "Billy McDonald, Frederick Bros. Agency, Inc."

Postscript: "We also have innumerable screen stars under contract to us. I can supply this list at your request."

Initialed, "BM" in typewriting.

By Mr. Doherty:

Q. Miss Katleman, yesterday, according to my recollection, you related a conversation that you overheard or had with Mr. Bishop while you were his secretary at M. C. A., respecting a contract that M. C. A. had with Mr. Daillard at San Diego; is that correct? [269]

A. Yes.

Q. When did that conversation take place?

A. I believe it was sometime in the fall of 1941. September or October, along in there. I am not positive.

(Testimony of Isabel Katleman)

Q. Was it possibly as late as November or December, 1941, or would you think it would be earlier than that?

A. I don't know, to be exact. I know it was in the fall, it was cold. It was a very cloudy day, I recall that.

Q. You never gave it any thought?

A. Not the date, no. The conversation remained in my mind, that was all.

Q. Did you make any note or memorandum of the conversation? A. No.

Q. And at that time did you have before you the rules and regulations of the Musicians Union?

A. Not before me. They were available in the office.

Q. Quite a thick volume, are they not? A. Yes.

Q. Probably a hundred pages or more of reasonably fine print?

A. I don't know the number of pages, but it is a small booklet, and it is very fine print.

Q. You had been studying that before?

A. I had looked at it, yes. [270]

Q. You had not made any effort to study it?

A. Not particularly. I wanted to know the type of business I was in because it was all foreign to me at the time, and I wanted to know more about the Musicians Union.

Q. Would you say the conversation took place in September, October, November or December, 1941? Now, give your best recollection.

A. I couldn't answer that, Mr. Doherty. I am sorry. I know it was in one of those four months, I am reasonably certain, but I couldn't say definitely which of the four.

(Testimony of Isabel Katleman)

Q. It could have taken place in any of those months?

A. Yes.

Q. How did the conversation happen to come up?

A. I believe Mr. Bishop said something to the effect of having entered into a contract with Mr. Daillard, and he was quite pleased at the fact that he had this account, which was quite remunerative for the office.

Q. Mr. Bishop was a salesman for M. C. A.?

A. Yes.

Q. And that was an account that he serviced?

A. That's right.

Q. You were at that time his confidential secretary?

A. I was.

Q. And you were just having, you might say, a discussion in a friendly way about business in the office?

A. That's right. [271]

Q. And he said something about the contract?

A. Yes.

Q. You had not seen the contract?

A. I might have seen it but I had never read it.

Q. And in what form was the contract, do you remember?

A. It was a letter.

Q. How is that?

A. It was a letter, as I recall, a letter of agreement to Mr. Daillard.

Q. Have you seen a copy of that since?

A. No; I have not.

Q. And who was the letter from or to?

A. It was to Mr. Daillard from Mr. Bishop.

(Testimony of Isabel Katleman)

Q. How is that?

A. To Mr. Daillard from Mr. Bishop, I think. I am not certain.

Q. Did Mr. Bishop sign it alone or did someone else sign it?

A. I don't know. I did not type it, so I consequently had very little to do with it.

Q. That was not your department, was it?

A. No, evidently not. I don't know who drew it up.

Q. Last evening, I asked you among other things this question or series of questions. I am reading from page 260 of the transcript, Mr. Reporter, beginning at line 15; and I [272] am asking the questions and you are answering.

“Q. And Mr. Finley has helped to refresh your recollection; he told you what he remembered you saying?

“A. No; he has not.

“Q. You have not talked with Mr. Finley in the last two or three weeks?

“A. I have seen him, yes.

“Q. You have not talked to him about the testimony you were to give here?

“A. No; I have not.

“Q. You have not talked with his attorneys?

“A. No.”

Page 261, beginning at line 1

“Q. You mean you have not talked with any of the attorneys for Mr. Finley before coming to this courtroom during the past two or three weeks?

“A. I have spoken with them. I passed the time of day with them; yes.

(Testimony of Isabel Katleman)

"Q. And they did not know what you were going to testify to until you came here on the stand?

"A. They did not, to my knowledge.

"Q. Isn't it a fact that you gave a statement and it was taken down in shorthand, which counsel read from right here in your presence?"

Then a discussion between Mr. Christensen and me and [273] his Honor.

"The Witness: I don't know what you mean about the stenographic report.

"Q. By Mr. Doherty: Who did you talk to about what you were going to testify to here today, before you came to this courtroom?

"A. No one.

"Q. No one?

"A. No.

"Q. And the questions that this fine gentleman, Mr. Christensen, asked of you were without going over the matter with you as to what the answers were going to be?

"A. Mr. Christensen and I have not discussed anything that we have talked about here on the stand.

"Q. Or Mr. Finley?

"A. No.

"Q. Or any other attorney representing Mr. Finley?

"A. No, sir.

"Q. Or any other person representing Mr. Finley?

"A. No, sir.

"Q. You have had no such talk with anybody?

"A. I have not."

Do you wish to let that testimony remain as it is? [274]

A. Yes, sir.

(Testimony of Isabel Katleman)

Q. And you have had no such conversation with anybody?

A. I have not discussed the trial with Mr. Finley or his attorneys, as I told you.

Q. You know a young lady named Miss Janice Halpern, do you not? A. I do.

Q. Who is she?

A. She is Lew Wasserman's secretary at M. C. A.

Q. And when did you see her recently?

A. One day last week. I do not recall the exact day.

Q. What day last week?

A. Thursday or Friday. I am not certain. We had luncheon.

Q. And where did you have lunch?

A. At Sherman's in Beverly Hills.

Q. At whose suggestion or invitation did you go there?

A. Well, we have been friends for a number of years, and whenever I am going over to Beverly Hills, if it is convenient, we meet for lunch.

Q. And you went to her office?

A. I picked her up outside the office; yes.

Q. And then you went to lunch together?

A. Yes.

Q. Who went to lunch with you other than Miss Halpern? [275] A. No one.

Q. Just the two of you? A. That is right.

Q. Did you have any conversation with her there?

A. Well, naturally.

Q. You did talk, didn't you? A. Yes.

(Testimony of Isabel Katleman)

Q. And you were sitting at the table, discussing various matters, and you told her, did you not, that you had been subpoenaed in this case? A. I did.

Q. And you showed her a subpoena in this case?

A. I did.

Q. And did you not at that time say that sometime before that Mr. Finley had talked to you about this case?

A. I told her that Mr. Finley had told me I was going to be subpoenaed; yes.

Q. Yes.

A. But nothing in fact—

Q. Then you had talked with Mr. Finley?

A. He had asked me if I would testify, when he knew he was going to trial, and I said, "Yes, I would," but that was all.

Q. And you and this young lady, Miss Halpern, did discuss this case at the luncheon? [276]

A. Just that far; that is all we said.

Q. Didn't you say to her that you trusted that would not break up your friendship and hers with each other because you were going to testify in this case?

A. I said it in a kidding way, Mr. Doherty, because Miss Halpern is very fond of the office for which she works, and jokingly, I said, "I hope that this will not come between our beautiful friendship." That was all. And she left and said, "Well, of course not."

Q. Didn't she say it didn't matter to her what happened? That it had nothing to do with your friendship?

A. Possibly she did.

Q. And didn't you say to her then, in words and substance, as follows: That two fellows, leg men you

(Testimony of Isabel Katleman)

called them, from the attorney's office had been up to see you the day before; had taken you to lunch and asked you to testify in the case and subpoenaed you?

A. They asked me if I would testify. They repeated what Mr. Finley had said. I am sure I didn't call them "leg men" because that is not a phrase which is familiar to me or habitual.

Q. Did you go to lunch with them?

A. Yes, I did; we went to luncheon.

Q. And who were these gentlemen?

A. Mr. Jaffee and Mr. Karp. [277]

Q. This gentleman here?

A. Yes, and the gentleman behind Mr. Finley.

Q. And who else went with you to lunch?

A. No one.

Q. Just the two of you? A. Yes.

Q. How long were you at lunch?

A. An hour, as I always am.

Q. And during the conversation, there was nothing said about the present case and what you were going to testify to?

A. No. They told me I was going to be subpoenaed, and I would presume, so that I would have my affairs in order at my office. But no mention was made of any testimony I was to bring up or anything of that sort.

Q. They gave you, did they not, a subpoena at that time? A. No; they did not.

Q. They did not give you the subpoena there?

A. No.

Q. And so, when this fine young gentleman here that you have just mentioned sat and talked with you last

(Testimony of Isabel Katleman)

Thursday for one hour at lunch, nothing was said by him to you or by you to him as to what you knew about this case?

A. I do not recall exactly. We were sitting at the Town and Country Market, and a man whom I knew walked up and we called him over to the table, and he sat with us all the [278] time that we were eating luncheon and he more or less monopolized the conversation, consequently we had very little to say.

Q. Yes?

A. And we ate our luncheon and they went back.

Q. Was not the question asked you, in substance and effect, something respecting what you were to say about Mr. Ames Bishop, one of the defendants in this case, and that you said he had been wonderful to you; that you had worked for him and he had been very fine to you before and ever since, or words to that effect?

A. I do not recall. Those are my feelings about Mr. Bishop. I have always regarded him as a very good friend.

Q. And didn't they ask you names of former employees of M. C. A. and you gave them the names of Eileen Quinn and Elsie Jensen?

A. Yes, I probably did.

Q. And they were two former employees of M. C. A.?

A. Yes.

Q. And you told the young men, so you told Miss Halpern, that you did not know where Elsie Jensen could be located?

A. I do not remember. I may have, because I don't know. I know her as an acquaintance. We have never been very friendly.

(Testimony of Isabel Katleman)

Q. Well, didn't you say to those young gentlemen that [279] you did not know where they could locate Elsie Jensen? A. Probably.

Q. And didn't you also say to Miss Halpern that you gave him the name of Eileen Quinn because you did not think they would bother her because she was out of town? A. No, I did not.

Q. You did not say that?

A. I gave them the name of Eileen Quinn.

Q. Didn't you then meet her again on Sunday and have dinner with her? A. No.

Q. When did you meet with her again?

A. I haven't seen her.

Q. What? A. I have not seen her since.

Q. You have not seen her since? A. No.

Q. Did you talk to her on the telephone on Monday?

A. I do not remember. She called me one morning. I was ill with a sore throat. She wanted to know how I was feeling and I told her I didn't feel well and would speak with her later.

Q. When did you have lunch with her at Delhaven's?

A. I do not remember, Mr. Doherty. This whole week is all very confused right now [280]

Q. Well, didn't you have lunch with her at Delhaven's on last Monday?

A. Let me think. I may have. I may have.

Q. You may have. Now, that is just less than four days ago.

A. I am trying to recall. Yes, I guess I did. I know I was in Beverly Hills Monday.

(Testimony of Isabel Katleman)

Q. You guess you did. Didn't you tell her there at that time that Mr. Finley had talked with you about your testimony? A. I did not.

Q. You did not? A. I did not.

Q. And you are willing to stand on your testimony that you never talked with Mr. Finley or this fine young gentleman here at the counsel table anything respecting what you were going to testify to in this case?

A. Definitely not. [281]

Q. Now, you have seen Miss Quinn lately, haven't you? A. Yes.

Q. And you found that she has been subpoenaed in this case to testify for Mr. Finley, and she was subpoenaed at San Francisco?

A. Well, I don't know. Miss Quinn was in Los Angeles.

Q. Well, she has stayed at your house, has she not?

A. She did, yes.

Q. She has stayed at your house since she was subpoenaed? A. Yes, she was my house guest.

Q. And neither you nor Miss Quinn talked about what you were going to testify about in this case?

A. No, we didn't. Miss Quinn and I have been friends for a long time. We have many things to discuss. She wanted to know what the case was about, because she has been out of the business for some years, and I gave her a brief resume of it.

Q. Where did you find out what this case was about?

A. Well, I think everybody in the music business knows about it. I have read about it in the papers, and

(Testimony of Isabel Katleman)

I know Mr. Finley, and everybody has been considerably interested since we heard there was to be a case.

Q. In what papers did you read about it?

A. Trade papers, "Variety" "Billboard," and the [282] "Daily News." Those are the papers I generally read.

Q. Where did Mr. Christensen get the information that caused him to ask you where you had worked on specific dates?

Mr. Christensen: To which we object as calling for her conclusion and opinion.

The Court: Overruled.

The Witness: Would you repeat the question, please?

The Court: Read it, please.

(The question was read.)

The witness: Could you qualify it? I don't understand, for example,—

Q. By Mr. Doherty: Well, Mr. Christensen asked you various questions here running over some ten or twelve pages yesterday about conversations you had with people at different times and places, and where you worked. Where did Mr. Christensen get that information, if you know? A. I don't know.

Q. —in order to enable him to ask you those questions?

A. I don't know. He could have gotten it from almost any one in the music business, I presume.

(Testimony of Isabel Katleman)

Q. Now, referring to page 244 in the transcript, beginning at line 5, Mr. Christensen asked you these questions, and these answers were given:

“Q. During the time that you were there, did you [283] have any conversation with Mr. Bishop concerning a contract with Wayne Daillard?

“A. Well, yes.

“Q. Tell me what that was.

“A. Oh, possibly three or four months after I had commenced working there and was learning the music business we discussed the fact that M. C. A. was booking the Pacific Square Ballroom.

“Q. By ‘we’ you mean you and Mr. Bishop?

“A. Mr. Bishop and I were.

“Q. That is one of the defendants here?

“A. Yes.

“Q. Tell me what was said.

“A. Something to the effect that there was an exclusive booking arrangement with Pacific Square, and I had been reading the by-laws of the American Federation of Musicians to familiarize myself with the business. I knew nothing about it, and I had recalled a phrase stipulating that no agent could book exclusively. And he said or intimated—

“Q. Who said?

“A. Mr. Bishop intimated there were—

“Mr. Doherty: Just a minute.

“By Mr. Christensen:

“Q. Instead of intimated, what did he say or do? [284]

“A. I am sorry. He sort of smiled and said, ‘Well, there are ways of getting around that,’ to be exact

(Testimony of Isabel Katleman)

Now, where did Mr. Christensen get the information that there was a conversation between you and Ames Bishop—

Mr. Christensen: To which we object.

Mr. Doherty: —respecting the Wayne Daillard contract made in 1941, if you know.

Mr. Christensen: To which we object as calling for her conclusion or opinion.

The Court: Overruled.

The Witness: I do not know.

Q. By Mr. Doherty: Now, are you certain that you didn't tell Mr. Finley, or this fine young gentleman here at the counsel table, about this conversation when you talked with Mr. Finley and with this young gentleman?

A. I mentioned the agreement to Mr. Finley several months ago after he had gotten the lease at Mission Beach. I had told him, by that time I believe every one in the industry knew that Mr. Bishop was booking Pacific Square, and I had remarked about it to him about that time, but I don't believe we have discussed it since.

Q. You remarked to Mr. Finley that there was a contract between Music Corporation of America and Mr. Daillard for Pacific Square? [285] A. Yes.

Q. You told Mr. Finley at that time the substance of this conversation to which you have testified, did you not?

A. I possibly may have.

Q. You then did talk with Mr. Finley before coming to this court?

A. Over a year ago, yes, Mr. Doherty, but I didn't know I was coming to court then.

Q. I will show you a photostatic copy of an original letter, this being the letter to Pacific Square Corporation from Music Corporation of America. Now, is that the

(Testimony of Isabel Katleman)

letter that you and Mr. Bishop discussed on the occasion that you refer to?

A. I believe so. I had never seen the letter except just like this to glance at.

Q. You never read it?

A. No, I didn't. I presume that is the same letter.

Mr. Doherty: It is stipulated, Mr. Christensen, that this is a photostatic copy of the letter between Music Corporation of America and Pacific Square Corporation which is involved in the issues in this case?

Mr. Christensen: Mr. Doherty, I only know that this letter was presented by Mr. Jules Stein and attached to his deposition. That is my only knowledge on the subject, sir.

Mr. Doherty: You have no objection, then, to its being [286] introduced at this time? The young lady gives as her opinion, and I am not quoting her exactly, that from her casual observation it is the letter.

Mr. Christensen: I have no objection.

Mr. Doherty: May it be marked, your Honor, as Defendants' E?

The Court: So ordered.

(The document referred to was marked as Defendants' Exhibit E, and was received in evidence.)

Mr. Doherty: May I read it to the jury, your Honor please?

The Court: Yes.

Mr. Doherty: This is a photostatic copy of an original document on the letterhead of Music Corporation of America, dated November 4, 1941:

(Testimony of Isabel Katleman)

"Pacific Square Corporation
Pacific Boulevard Ballroom
Ash Street
San Diego, California

"Gentlemen:

"This letter confirms agreement made between us today, as follows:

"1. We agree to give you first refusal on all orchestra bookings for the city of San Diego. If you do not contract for any orchestra offered you within forty-eight (48) hours from the first submission, [287] we are free to sell this orchestra anywhere in your territory upon terms no less than submitted to you. It is definitely understood, however, that engagements in theatres, expositions, fairs and the like are not included in this agreement.

"2. In consideration of our granting you the first refusal on orchestra bookings, you agree to buy from us either seventy-five (75) per cent of the orchestras offered to you upon the terms submitted, or a minimum of thirty-five (35) orchestras per year.

"3. You further agree that should you employ a weekly house band, averaging two (2) or more days per week, that this house band will be obtained from us for at least forty-eight (48) weeks out of the year.

"You understand and acknowledge the fact that in all cases we are acting only as agents for our orchestras and will use our best efforts to supply all the orchestras under our management according to the above conditions. However, it is understood that should an orchestra of its own accord accept engagements in your territory that we are

(Testimony of Isabel Katleman)

unable to control such bookings, and we shall not be responsible therefor. All the rules and [288] regulations of the American Federation of Musicians become a part of this agreement.

"The original term of this agreement extended from January 1, 1941 to January 1, 1942. You are to have options to extend this agreement for five (5) successive periods of one year each, commencing on January 1st and ending on December 31st of each year, provided that you have complied with all of the terms and conditions of this agreement during the preceding year.

"These options are to be exercised consecutively by written notice to be received by this office prior to January 1st of each year. If you have not complied with the terms and conditions of this agreement it automatically comes to an end at the end of the year within which the failure to comply occurred.

"It is also understood that all orchestras booked by you under this agreement may be played only at the Pacific Boulevard Ballroom, Ash Street, San Diego, or Mission Beach Ballroom unless you receive written consent from us to alter this arrangement.

"If this letter is satisfactory kindly have one of your officers signify your acceptance by [289] signing for your company in the space provided below.

"Yours very truly,

"Music Corporation of America"

And there are two signatures. One looks like Mr. Kramer, written very poorly, so I will not vouch for the signature, and then at the lower left-hand side there is:

(Testimony of Isabel Katleman)

"Accepted:

"Pacific Square Corporation

"By Wayne Dailard, President." [290]

Mr. Doherty: Mr. Christensen, solely for the purpose of expediting the trial and putting the matter before the jury in more consecutive order, have you any objection to the introduction at this time of the subsequent contract?

(Discussion between counsel off the record.)

Mr. Doherty: Excuse us, your Honor. Counsel are trying to get to an agreement to expedite matters here.

The Court: Now, gentlemen, you had better have your conversation later.

Mr. Christensen: Yes, go right ahead.

The Court: I don't know whether you can be heard or not. These sounding walls are very keen, and I can hear what you say, and maybe some of the jury can.

Mr. Doherty: They are freakish, your Honor. Sometimes there is a dead space. Sometimes when I stand here and your Honor speaks, I don't hear a word, and if I step back, I can hear you clearly.

We now offer as Defendants' F a document dated the 3rd day of May, 1944.

May I read just a brief part of it to the jury? I will not read all of it. It will be all in evidence, but I don't intend to take the time to read the entire document.

The Court: If it is satisfactory to the other side.

Mr. Doherty: Would you like to have all of it read?

Mr. Christensen: Yes. [291]

(The document referred to was marked as Defendants' Exhibit F, and was received in evidence.)

(Testimony of Isabel Katleman)

Mr. Doherty: Now reading Defendants' Exhibit F, entitled "Agreement."

"This Agreement, executed in duplicate as of the third day of May, 1944, by and between Music Corporation of America, a corporation, first party, and Wayne W. Dailard and Frances A. Dailard, second parties,

Witnesseth:

"Whereas, first party is the exclusive agent and representative of a number of orchestra leaders and orchestras, and

"Whereas, second parties, as general partners of Pacific Square, Ltd., a limited partnership, are the operators of Pacific Square Ballroom, at Pacific Boulevard and Ash Street in the City of San Diego, County of San Diego, State of California, and

"Whereas, one or both of said second parties, alone or in conjunction with others, are the operators of the Mission Beach Ballroom, at Mission Beach, in the County of San Diego, State of California, and

"Whereas, first party is desirous of furnishing orchestras to second parties and second parties are desirous [292] of obtaining orchestras from first party,

"Now, Therefore, in consideration of the premises and of the respective covenants and agreements of the parties herein contained, it is mutually agreed as follows:

"(1) First party agrees to afford to second parties the first refusal on all orchestra bookings offered by first party for engagements at ballrooms, open air pavilions, street dances in the County of San Diego, State of California, it being understood and agreed, however, that first party shall be under no obligation to offer to second parties

(Testimony of Isabel Katleman)

the first refusal of such orchestra bookings for engagements in theatres, concerts, radio broadcasts, and other similar functions.

"In the case of expositions and fairs, first party shall give second parties the first refusal on all orchestra bookings for engagements at commercial ballrooms, dance halls, open air pavilions, street dances, within or in connection with such exposition or fair, but shall not be obliged to do so in the case of engagements at non-commercial ballrooms, dance halls, open air pavilions, street dances, or the like, nor in connection with engagements at theatres, shows, cafes, night clubs, radio [293] broadcasts, concerts, or the like, within or in connection with such exposition or fair.

"For the purposes of this agreement a commercial ballroom, dance hall, open air pavilion, street dance, shall be deemed to be one which is operated primarily for profit or gain; and a non-commercial ballroom, dance hall, open air pavilion, street dance, or the like, shall be deemed to be one operated primarily for the good-will or advertising value thereof rather than for the profit or gain realized or to be realized from the operation thereof.

"(2) All orchestra bookings offered by first party to second parties pursuant to this agreement shall be submitted to second parties at San Diego, California, for their acceptance or rejection. If second parties shall not accept and contract for any orchestra so offered within forty-eight (48) hours from the submission of the same to second parties, first party shall be free to offer said orchestra elsewhere within San Diego County; provided, however, that it shall not offer the same upon terms or

(Testimony of Isabel Katleman)

conditions more favorable to the purchaser than the terms and conditions upon which it was offered to second parties. [294]

“(3) This agreement extends to all orchestra leaders and orchestras under the management of first party, and first party agrees to employ its fullest powers and resources to supply second parties with all leaders and orchestras under first party’s management in accordance with this agreement. It is understood and agreed, however, that if any leader or orchdestra under first party’s management accepts an engagement in San Diego County otherwise than through the offices of first party, and under circumstances not subject to the control of first party, and under circumstances not subject to the control of first, first party shall be under no obligation to second parties on account thereof.

“(4) All the rules and regulations of the American Federation of Musicians now or hereafter existing are hereby made a part of this agreement.

“(5) This agreement shall commence on the first day of May, 1944, and shall continue thereafter to and including the thirtieth day of April, 1945; provided, however, that second parties shall have options to extend this agreement for five (5) successive terms of one year each commencing on the [295] first day of May and ending on the thirtieth day of April in each instance, upon condition, however, that second parties shall have complied with all the terms and conditions of this agreement during the preceding year. Such options are to be exercised consecutively by written notice to be received by first party at its office at Beverly Hills, California, on or before May

(Testimony of Isabel Katleman)

first of each year. If second parties shall fail to comply with the terms and conditions of this agreement, the same shall automatically come to an end at the end of the current term during which failure to comply occurs.

“(6) No orchestra furnished by first party to second parties hereunder shall be played at any place other than Pacific Square Ballroom, Pacific Boulevard and Ash Streets, San Diego, California, or Mission Beach Ballroom, Mission Beach, San Diego, California, or a ballroom, dance hall, open air pavilion, street dance, operated by second parties at an exposition or fair within San Diego County, without the written consent of first party.

“(7) In consideration of this agreement, second parties agree to purchase from first party [296] either a minimum of seventy-five (75) per cent of the orchestras offered by first party to second parties pursuant to this agreement, or in the alternative, a minimum of thirty-five (35) orchestras per year, which thirty-five (35) orchestras cannot be less than 75% engaged by said second party.

“(8) In *further* consideration of this agreement, second parties agree that if they should employ a weekly house band playing an average of two or more days per week, such house band shall be purchased from first party for a minimum of forty-eight (48) weeks out of the year.

“(9) This agreement is personal to the parties hereto and is not transferable to any other parties, firms, persons, or corporations.

“(10) This agreement supersedes the previous letter agreement dated November 4, 1941.

“In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

“Music Corporation of America,

(Testimony of Isabel Katleman)

Signed by an officer who I think is Mr. Jules Stein, the president. I will not vouch for that. It looks like the signature of Mr. Stein. And "Wayne W. Dailard" and "Frances A. Dailard." [297]

Mr. Doherty: That is all.

Mr. Christensen: Mr. Doherty, you mean that is all the questions you have?

Mr. Doherty: Yes, sir.

Re-Direct Examination

By Mr. Christensen:

Q. Miss Katleman, you were asked concerning a portion of your conversation had with Mr. Jaffe. Will you tell us what the rest of the conversation was?

A. You mean on that what we talked about at the luncheon?

Q. Yes, I would like to have the whole picture, if you will.

The Court: The whole picture is not conversation. The first question was proper. Now you have modified it and it is not proper.

Mr. Christensen: I used "picture" as meaning the whole conversation.

The Court: It has no meaning in court.

The Witness: We talked about what Mr. Jaffe had done in the war, and various medals he had won, and we talked about his new baby and the furniture he bought for his house. That took up the luncheon hour. I didn't want to particularly discuss the trial, and that was all.

(Testimony of Isabel Katleman)

Q. By Mr. Christensen: Now, you have told us that you told Mr. Finley of the fact of the conversation with Mr. Bishop, [298] and I am not clear when that conversation took place, Miss Katleman. [299]

A. I believe it was a week or so after Mr. Finley had gotten a lease on Mission Beach; around that time.

Q. Then, that would be about November of 1944; would that help you to fix the date for us?

A. Yes, I imagine. I believe he was awarded the lease in October of that year, toward the end of October, and it was a week or so after that.

Q. And where did that conversation take place?

A. In my office at the William Morris Agency?

Q. Was there any person present other than you two, Miss Katleman?

A. I don't remember. Mr. Finley came up to see Jack Flynn and was waiting for him, and we were talking. There may have been people wandering in and out, and I don't believe anyone was there during the entire conversation.

Q. What was that conversation?

A. He was curious to know just what the arrangement was, as I recall it, between M. C. A. and Pacific Square; and I told him what I knew of it, which by then was common knowledge. Everyone in the music business knew it, so actually I was not violating any confidences so far as I know.

Q. Excepting in passing in the hall or passing, have you ever talked with me in your lifetime?

A. No; I haven't. We said, "Hello."

(Testimony of Isabel Katleman)

Q. Either in person, telephone, communicated by mail, [300] telegraph, telephone, or anything else?

A. No. I didn't know who you were when I came in here.

Re-Cross Examination

By Mr. Doherty:

Q. How long have you known Mr. Jaffe?

A. Oh, about a week and a half, possibly, from the day he came into the office.

Q. That was the first time you ever saw him?

A. Yes.

Q. And then you went to lunch with him?

A. Yes.

Q. And did he tell you why he wanted to go to lunch with you?

A. Well, it was lunch time and we were all hungry. I was just getting ready to go and he said, "Well, let us all go together."

Q. You had never seen him before?

A. No; I had not.

Q. Who made the suggestion? Did you call him up and say you would like to go to lunch with him?

A. No. He came into the office.

Q. Oh, he came into your office?

A. And it was one o'clock.

Q. What is it?

A. He and Mr. Karp came into the office. I don't know [301] if Mr. Finley was with him or not. My office and Mr. McDonald's are separated by two other offices.

(Testimony of Isabel Katleman)

Q. Who introduced you to Mr. Jaffe and the other gentleman with him?

A. They came in and introduced—I had met Mr. Karp once before with Barney McDevit. They came into the office to see Mr. McDonald, and he came back ostensibly to say “hello” and introduced me to Mr. Jaffe.

Q. You said just a moment ago that when Mr. Jaffe and the other gentleman came into the office you did not know whether Mr. Finley was with them or not.

A. No; I do not.

Q. Can you refresh your recollection? It is only, you know, a week ago or thereabouts.

A. I did not see him. He may have gone directly into Mr. McDonald’s office, and the floor plan of the building being such that I would not have seen him, you see.

Q. Mr. Finley did not introduce you to Mr. Jaffe?

A. No; Mr. Karp did.

Q. Did Mr. Finley telephone to you that Mr. Jaffe was coming out to see you? A. No.

Q. Did anybody telephone to you that Mr. Jaffe was coming out?

A. No; and I had a previous luncheon engagement with [302] one of the girls in the office when they walked in.

Q. And you broke that engagement and went with Mr. Jaffe? A. Yes, and Mr. Karp.

Q. A perfect stranger to you up until that time?

A. Yes. Yes.

(Testimony of Isabel Katleman)

Q. And you just broke the engagement with the young lady you were having lunch with and went to lunch with Mr. Jaffe, a man you had never seen before?

A. Well, I had seen Mr. Karp before, and sometimes it is more enjoyable to go to luncheon with two gentlemen rather than with another girl.

Q. And they just indicated they came out to take you to lunch? A. Yes.

Q. And you went to lunch, sat at the table there and ate lunch, and talked nothing about why they had come to see you?

A. They told me that I was going to be subpoenaed, as I told you before, and asked me if I would testify, to which I agreed, and the conversation then went into other channels.

Q. And they asked you if you would testify and you said that you would? A. I did.

Q. And did you tell them then what you would testify to? [303]

A. I don't believe so, no. I am quite sure that I did not. We did not dwell upon the trial, as I told you previously.

Mr. Doherty: Read that last answer, please.

(Answer read by the reporter.)

Q. I am not asking you whether you dwelt upon it. Was anything said in that conversation as to what you were going to testify to in this case respecting conversations you had with Mr. Ames Bishop on the telephone, conversations you had with Mr. Ames Bishop in his office, or any other phase of this case? A. No.

(Testimony of Isabel Katleman)

Q. Was Mr. Ames Bishop's name mentioned in the conversation?

A. Yes. They asked me if I knew him and I said, "Yes."

Q. Was Mr. Daillard's name mentioned in that conversation? A. I don't recall.

Q. Was Mr. Finley's name mentioned in the conversation? A. Yes.

Q. Was Music Corporation of America's name mentioned in the conversation?

A. I don't remember, Mr. Doherty. I am sorry.

Q. You do not remember that? A. No. [304]

Q. And then, when you got through lunch, after you talked about Mr. Jaffe's baby and other pleasantries, they took you back to the office? A. Yes, sir.

Q. And did they come into your office at that time?

A. No. They let me off outside and they drove on.

Q. And when you went back into the office was Mr. Finley there?

A. I don't think so; no. No, I am quite sure he was not.

Q. How did you know Mr. Finley was in the building and may have gone into Mr. McDonald's office when Mr. Jaffe first came into your office?

A. I didn't know. I said he may have. I had no way of knowing.

Q. Did you learn later that Mr. Finley had been in to Mr. McDonald's office?

No. 11483

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LARRY FINLEY and MIRIAM FINLEY,

Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellees,

and

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellants,

vs.

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TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME II

(Pages 321 to 656, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,

Central Division

FILED

FEB 24 1947

PAUL P. O'BRIEN, JR.

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(Testimony of Isabel Katleman)

A. I don't believe so. I don't believe I questioned Mr. McDonald about it. I had presumed that if Mr. Finley had been in, he would have come in to say "hello" to me also.

Q. Then, that was just merely a voluntary statement, that you did not know whether Mr. Finley was in the building or not and he had gone into Mr. McDonald's office, or he may have gone into Mr. McDonald's office?

A. Possibly, yes. [305]

Q. Did Mr. Jaffe tell you what connection he had with the case?

A. He introduced—Mr. Karp introduced him as being a colleague in the law office which was handling Mr. Finley's case. Yes; in that way.

Q. In other words, you understood him to be one of the attorneys for Mr. Finley? A. Yes.

Q. Did you discuss Mission Beach at all?

A. I believe they asked me if I had seen it and I said, "Yes." I thought it was a beautiful ballroom, and that was all.

Mr. Doherty: I think that is all, Miss Katleman.

Mr. Christensen: Thank you very much, Miss Katleman. I believe you may be excused.

The Court: We will take our recess now. Ladies and gentlemen, remember the admonition and keep its terms inviolate. Occupy the jury room, please.

(Short recess.)

The Court: All present. Proceed.

WILLIAM McDONALD,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: William McDonald. [306]

Direct Examination

By Mr. Christensen:

Q. Commonly, Billy, isn't it? A. Yes, sir.

Q. Billy McDonald. Your business, occupation or profession, sir, is what?

A. I am now the head of the band department of the Frederick Bros. Agency.

Q. What is the business of Frederick Bros. Agency, sir?

A. It is a booking agent representing various bands and artists throughout the country; a nation-wide organization.

Q. For what period of time have you been so employed, sir?

A. I was with them for about 8 months and left for about 5 weeks, and I went back with them in February, last year; so I have been with them practically a year solid since returning to the Agency.

Q. During that five weeks' period you were employed by whom? A. Mr. Finley.

Q. What were your duties as such?

A. My capacity was to manage two ballrooms which he had, and also to buy talent for the same.

Q. Which ballrooms are you referring to, sir?

A. Trianon ballroom in San Diego and the Mission Beach [307] ballroom at Mission Beach:

(Testimony of William McDonald)

Q. When you went to work for Mr. Finley in February, as I remember it, in 1945—is that true or not?

A. I believe I left Mr. Finley in 1945.

Q. Yes. And was it the month of February or was it some other month? I am not quite clear on that.

A. No. I went to work with him about four or five days prior to the first of the year, if I remember right, of 1945, and continued with him for a month.

Q. I see. During the time you were with him did you make attempts or any attempt to book any band or orchestra from M. C. A. or with M. C. A. ?

A. Yes.

Q. When was that, sir? The first one let us take.

A. Well, as far as the bands, our first attempt was not at a band. I believe it was an attraction, because we were told we couldn't have bands.

Q. Because you were told you couldn't have bands. Who told you that?

A. Well, I phoned Mr. Bishop and Mr. Bishop said that Mr. Daillard got the first choice of the bands.

Q. When was that, sir?

Mr. Doherty: Would you lay the foundation of time and persons present?

Mr. Christensen: That is what I am asking him about.
[308] Thank you, Mr. Doherty.

Q. When was that, sir?

A. Just after I went onto the payroll of Mr. Finley.

Q. Will you relate all of that conversation you had with Mr. Bishop on the telephone at that time, sir?

A. As a matter of fact, the conversation, I was trying to line up a series of bands for Mission Beach for the coming year, prior to our opening, or, rather, our full

(Testimony of William McDonald)

week opening for the summer, which I believe was around May 18th or 11th, something like that; and I wanted to get some weekend bands. Mr. Bishop related to me that he could not give us weekend bands at that time; that Mr. Dailard had first choice on all bands; if there was anything left over, why, he would submit them to us. That was the gist of our conversation.

Q. And when did you next talk with anybody connected with M. C. A. ?

A. Mr. Finley and I went in to try to buy some attractions, into the Music Corporation of America. The exact date I don't remember.

Q. When you say "attractions" what do you mean by attractions, sir?

A. Well, I mean somebody that is of a national prominence, or that we think is of national prominence, that might mean profitable sales transactions. In other words, we buy them and we think they will bring enough money [309] in the door to make a nickel, also.

Q. Let us put that in another way, then. There is a difference, then, I take it, between orchestras or bands and attractions; is that true or untrue?

A. Well, when you have a place of entertainment, there's two things that will draw people in the front door: either a band of national prominence or an artist of national prominence.

Q. And you then say you went with Mr. Finley to the office of Music Corporation of America in an attempt to secure some attractions? A. Yes.

Q. Please tell me when that was, sir?

A. Well, the exact date I can't remember. It would be sometime in January, when I was under the salary of

(Testimony of William McDonald)

Mr. Finley and accompanying him on his business trips more or less.

Q. To whom did you speak there of the M. C. A. ?

A. We went into Mr. Burnet's office.

Q. All right. Was there any person other than you and Mr. Finley and Mr. Burnet present, sir?

A. Mr. Ken Later was called.

The reporter: Mr. Later?

The Witness: Mr. Ken Later was called in.

Mr. Doherty: L-a-t-e-r, Mr. Reporter.

Q. By Mr. Christensen: Now, will you tell me what was [319] said and what was done on that occasion, sir?

A. Well, we had taken it for granted that due to the existing circumstances at that time, that being very few bands available due to the war conditions, that we would have to turn around and buy attractions to bring people into the ballroom; in other words, individual personalities, such as screen stars, recording stars, et cetera. So we went in to try to make a deal with Bonita Granville and the King Sisters, I believe. [311]

Q. That is with Barnet?

A. Mr. Barnet, yes.

Q. And Mr. Later was present, however?

A. Mr. Later was called in because I believe he was in the acts department at that time.

Q. Now, go ahead, tell us what was said and done, please.

Mr. Doherty: May I interrupt for a moment? The charge in the complaint is the monopoly of bands. Now, we are going into the field of attractions, and there is no issue in the case respecting attractions or any monopoly or restraint of trade in respect to attractions. I am not

(Testimony of William McDonald)

going to press it, but I am making the suggestion to your Honor that it is objectionable, it seems to me, and not within the issues of the case.

The Court: I think we should groove the case in the issues that are framed by the pleadings, Mr. Christensen, and these questions should be directed to the witness to do that very thing.

Mr. Christensen: Would your Honor let me invite attention to the fact that we do set forth in, I believe, the complaint, but certainly in the motions that have heretofore been heard concerning the King Sisters booking, and the other one?

The Court: That is true. There is an evidential feature [312] brought into the case on pre-trial, and at other periods in the history of the litigation, but the issue that the jury will be called upon to determine will be that of bands.

Mr. Christensen: It was for the purpose of showing the existence of the conspiracy by circumstantial evidence, your Honor.

The Court: I don't know just how far the rule of similar acts would go in a civil action of this type. I think we should confine it. I am not speaking now of the specific designation of so-called attractions other than bands that have been discussed between counsel and the court at pre-trial conferences, but so far as the issue to be determined by the jury is concerned, it would be confined to the band issue. It may be that the rule that is generally applicable in alleged conspiracy cases as to the introduction of similar circumstances would be applicable here, but, after all, the issue on that phase of the case will be the issue of an alleged conspiracy with respect to name

(Testimony of William McDonald)

bands. I am not going to permit too much deviation. As I recall, that was a general question. Will you read the question, please?

(The record was read.)

The Court: I think the other reporter probably has the original question.

Mr. Warne: May I suggest what it was, please?

The Court: Yes. [313]

Mr. Warne: It was that they went and tried to get Granville and the King Sisters as the attractions. That was the entire question.

The Court: Yes, that is too broad a question. I don't recall anything about the Granville incident in the pre-trial conferences.

Mr. Warne: There was none.

The Court: I specifically recall the King Sisters.

Mr. Christensen: May I refer to the affidavit in opposition to the motion for summary judgment?

The Court: I am not going to consider those, so far as the jury is concerned.

Mr. Christensen: All right. May I have a moment, then, to check our complaint?

The Court: Yes. The fifth allegation is the one.

Mr. Christensen: Page 6 of the complaint, sub-paragraph or paragraph (d) has to do with the King Sisters.

The Court: Yes. I am clear on that. I am not speaking of that.

Mr. Doherty: As your Honor says, that is merely evidentiary.

The Court: I think we will confine it to the issues and not permit the jury to deviate from the groove that

(Testimony of William McDonald)

the litigants have prescribed in the pre-trial conferences. Objections sustained. [314]

Mr. Christensen: May I inquire concerning the King Sisters, the conversation concerning that?

The Court: I think that is within the expanded situation that is disclosed by the pre-trial conferences.

Q. By Mr. Christensen: Mr. McDonald, in giving the conversation there and telling what was done, I want you to confine it to the conversation had, if any, concerning the King Sisters and bands, or, bands and orchestras.

A. Well, concerning the King Sisters, a price was set for their appearance—

Q. Wait, please. You can help us better if you will give us the conversation. Before you do, tell me this: You have already said the name of Bontia Granville came up. Was that just incidental, or was it something more than that? You can answer that "Yes" or "No." Was it just incidental?

The Court: How would he know?

The Witness: It was a supposition, yes.

Q. By Mr. Christensen: Now, will you confine your conversation there and omit any reference to any conversation concerning Bonita Granville, and limit it to conversations concerning the King Sisters, bands and orchestras.

A. A price was set for the appearance of the King Sisters.

Q. Who set that, sir? A. Mr. Later. [315]

Q. What did he say?

A. Well, he mentioned a price for the two parties concerned. We are forgetting Bonita Granville, so we are with the King Sisters now, and a price was mentioned,

(Testimony of William McDonald)

I don't know whether you want me to mention the price, and I thought it was a little too much.

Q. Just tell us what was said, and just limit it to the King Sisters.

A. They wished \$1500.00 for the King Sisters. I said it was too much. However, Mr. Finley overruled me, and that was as far as I knew on that one thing until I was told at a later date.

Now, so far as orchestras were concerned, we asked Mr. Barnet about the orchestra situation. Mr. Barnet said he would check into the validity, if any, or if they had a contract in force with Mr. Dailard he didn't know, but would check into it, and try to help us on the situation of securing bands.

Q. Did he say you could have the King Sisters for an engagement at Mission Beach?

A. In that conversation I did not hear him say they could.

Q. Was there any further conversation at that time, concerning bands and orchestras?

A. We went to lunch and— [316]

Q. Permit me to interrupt you. A. Yes.

Q. When you say "we" who is "we"?

A. Mr. Barnet, Mr. Finley, myself, and another party. I can't remember exactly who it was. I think a Mr. Thayer come over and joined us. I am not quite sure whether it was Mr. Thayer or Mr. Howard. I don't recall.

Q. That was at the Copper Kettle? A. Yes.

Q. That is the name of a restaurant in Beverly Hills?

A. That's right.

(Testimony of William McDonald)

Q. And at that place there was some conversation, was there, sir?

A. The conversation was to the effect, Larry said, "Can I go out and buy the bands direct?"

Mr. Barnet said, "There is no way for us to stop you from doing that." He said, "However, all contracts will have to come through us, as we have them under management contracts." That was just about the gist of the conversation, as I can remember it.

Q. Was there any band leader present at that stage of the proceedings?

A. As we walked up we ran into Jan Garber.

Q. What, if anything, happened with reference to him?

A. If I remember right, Larry said, Mr. Finley said, [317] "Can I see Jan?" And Larry said, "Wait until later." Now, I am not quite sure of that conversation. I think that is about the gist of it.

Q. You say that Larry Barnet said that to Mr. Finley?

A. Yes, sir.

Q. Did you have any further conversations with any of the defendants?

A. No, I don't believe I did, with the exception, as I have quoted before, of asking Mr. Bishop for bands.

Q. When did you do that next, sir?

A. I say it was sometime during the month I was working for Mr. Finley.

Q. How many times did you ask him for that?

A. I just asked him once. Then we let it go at that.

Q. Have you sold any of the Frederick Brothers bands to Mr. Dailard?

A. As an agent of Frederick Brothers?

(Testimony of William McDonald)

Q. Yes, sir.

A. Yes, I have sold them to—while I have been in the office, two bands have been sold to Mission Beach, yes, sir.

Q. They are?

A. Ina Rae Hutton and Georgia Auld.

Q. When was that, sir?

A. Ina Rae Hutton when I first came with the company. [318] It is about a year and three-quarters, a year, or a year and a half ago. Georgia Auld about three or four months back.

Q. Did you make those bookings directly with Mr. Dailard?

A. I tried to make them directly with Mr. Dailard, and Mr. Dailard told me I would have to see and call Mr. Bishop as he was handling the Pacific Square.

Q. Now, during the year 1945 can you tell us how many name bands Frederick Brothers Agency had here available to ballroom operators in the San Diego area, sir?

A. I think Mr. Shea answered that question yesterday by saying we didn't have any name bands.

Mr. Doherty: I think the witness should speak from his own knowledge.

Q. By Mr. Christensen: I want you to speak for yourself, John,—or Billy, I mean.

The Court: Let's address these witnesses properly instead of by the familiar terms.

The Witness: Will you repeat the question, please?

Q. By Mr. Christensen: Will you answer that question for yourself, sir, rather than by reference to Mr. Shea?

(Testimony of William McDonald)

The Court: We will have the original question read, please.

(The question referred to was read as follows:

“Q. Now, during the year 1945 can you tell us [319] how many name bands Frederick Brothers Agency had here available to ballroom operators in the San Diego area, sir?”)

The Witness: A. The name band category or, rather, as I would define a name band, frankly, I don't believe we have had any real name bands available. We have had many semi-name bands such as play at the Pacific Square.

Q. By Mr. Christensen: By the way, in your bookings there of those two bands with Mr. Daillard, did you have to split commissions? A. Yes.

Q. With the Music Corporation of America?

A. Yes.

Q. Now, then, you recall giving a letter to Mr. Finley under date of September 14, 1944, do you not, sir?

A. The date I don't remember. I know I sent him many letters.

Mr. Christensen: If I may have the letter, please.

Mr. Doherty: Here is another photostatic copy, and so far as I am concerned, you may use it.

The Court: You can use it if you both agree that it is a copy. In changing clerks here there is sometimes a little confusion.

Mr. Christensen: You agree I may use this photostat instead of the photostat which the clerk has marked?

[320]

(Testimony of William McDonald)

Mr. Doherty: Yes, it is agreeable to me. I think the reporter has temporarily mislaid the original. It is not here on the clerk's desk.

The Court: We will probably find it during the recess.

Mr. Doherty: It is agreeable with us if Mr. Christensen uses his copy.

The Court: Yes. The clerk will follow these exhibits and see that they are here.

The Clerk: I think that one is out in the reporter's room.

The Court: Will you locate them and see that they get back on your desk?

The Clerk: Yes.

Q. By Mr. Christensen: The signature "Billy" on this letter written on the stationery of Frederick Bros. Agency, Inc. under date of September 14, 1944, and which is a photostatic copy of the original, just as is Defendants' Exhibit D,—there appears a name written on it "Billy" over the typewritten name "Billy McDonald." Is that your writing, sir? A. Yes, sir.

Q. In that letter you state that you have available a certain list, or, a list of certain orchestras, Lawrence Welk and his Champagne Music. Are you familiar with that band? [321] A. Yes, sir.

Q. Was that available for any operator in the San Diego area during 1945?

A. Not, it was not available.

Q. Is that a name band?

A. It wasn't a nationally-known name band. It was a regionally-known name band.

(Testimony of William McDonald)

Q. Was Ina Rae Hutton and her famous orchestra available on the West Coast, particularly in the San Diego area, during the year 1945, sir? A. Yes.

Q. When was that?

A. Ina came out to—let me see—1945?

Q. Yes, sir.

A. Yes, she would have been available. I don't know the exact date she brought her band back into town, played a few one-nighters and broke the band up, but she would have been available for any dates we had before she broke the band up.

Q. Would you say that is a name band?

A. From the price received, I think it is acceptable as such.

Q. And George Paxton, was that available here?

A. During 1944 he wasn't available. Let me see.

Q. 1945? [322]

A. 1945 he was not available, no.

Q. Milt Britton, was he available?

A. He was available, and he played here.

Q. Where did he play?

A. He played my entire territory, which is eleven western states.

Q. Was he available to San Diego?

A. He would have been.

Q. What do you mean by "would have been"?

A. Well, if I had an occasion to book him down there, he would have been.

Q. Was he a name band or is a name band?

A. He was known in theatres, but he wasn't a name band with dance people.

(Testimony of William McDonald)

Q. You said in your letter you would like to do business on an exclusive basis. Were you referring there to bands or orchestras, sir?

A. May I read that paragraph?

Q. Surely.

(The document referred to was handed to the witness.)

Mr. Doherty: Let the record show, Miss Reporter, he is reading from Defendants' Exhibit D.

The Witness: Now, will you repeat the question, and maybe I can answer it.

Mr. Christensen: Will you read it, please? [323]

(The question was read.)

The Witness: A. I was referring to only attractions.

Q. By Mr. Christensen: The word "attractions," as you have used it here, sir, means what?

A. Individual personalities, small groups of national prominence through the medium of recordings or radio, stage and screen.

The Court: Read that answer, please.

(The answer was read.)

The Witness: Who have gained national prominence through the recordings.

Q. By Mr. Christensen: Does that refer to orchestras and acts or singers, or does it refer to just one of those groups?

A. It does not refer to orchestras.

Q. By the way, so that we will have it clearly in mind, when you use the term "name band," what do you mean by it?

A. Well, a name band is an orchestra that has gained national prominence through a certain style of music or certain individuality about the person fronting the band

(Testimony of William McDonald)

that has caused most people in the country to become curious about what it is, and therefore people go to see the band work; more people go to see one band work than they would another band. In other words, one band will draw more people than the next band, and the band that will draw five or six thousand dollars [324] a night can be assured it is a name band.

Q. Would it be a fair statement to say that by reason of advertising of the particular band that it has become a name band, if the advertising is nation-wide?

A. Not necessarily.

Q. When I said "advertising," through the making of records or playing of radio programs or other forms of exploitation? That is what I had in mind when I said "advertising." Is that a fair statement or not, Mr. McDonald?

A. Well, if a band has been on a national radio show, has made motion pictures in which they have been featured and not just a background, but have been featured on the screen billing, and if they have made one hit record, to be followed up by another hit record, to be followed up by another hit record, I believe you can consider them a name band.

Q. Now, then, in the year 1945 how many name bands did Frederick Bros. Agency have available to ballroom operators in the San Diego area?

A. In my definition of a name band I would say we had one name band, and upon call we had a very long list of semi-names.

(Testimony of William McDonald)

Q. Mr. McDonald, can you tell us how the booking is done of bands into ballrooms? Give us the outline, as to the manner in which that is done, sir. [325]

A. Well, are we speaking of one band in particular?

Q. No, tell us generally.

A. Well, generally it is by—if you have what you call a name band, why, you can phone the gentlemen up and they will make room for the band to play, because they know it will be a money-maker for them.

Q. In other words, you would phone a ballroom operator?

A. That's right, and tell them when the band will be available, and if it is a name that big, they will make room for it.

Q. Now, you have already told us "nationally-known." Does that mean they travel about? A. Yes.

Q. Let's take the band in some other part of the country. That is correct, the bands do travel cross-country, do they not? A. Yes, sir.

Q. All right. Let's start them some place in the East, or Middle West, or way down in New Orleans, and bring them west and show us how you do it.

A. If you have a booking out here on the West Coast for a band, a location engagement for six or eight weeks, and they are leaving another locality, say New Orleans, they might have a 21-day layoff period. Now, if the band leader wants to pick up some money, he can play a series of one- [326] nighters, that is, play a different engagement every night on the way to his location engagement.

Q. You make those bookings, do you?

A. Well, from New Orleans it would be handled from my Chicago office until it got to Texas or Denver, and

(Testimony of William McDonald)

I would pick the band up and bring it to the location engagement.

Q. Tell me what you mean by "I would pick it up"?

A. Each office has territories, so my Chicago office would—say I picked it up in Denver, they would book it up to a certain day, within 300 miles of Denver, and then on the following day I would attempt to book it in Denver, and on succeeding days at other places to bring it into my location engagement, which I had succeeded in getting for them.

Q. Do you go there personally to do that?

A. It is all done by phone calls, wires, and letters. In fact, I do business with lots of people I have never met.

Q. Do you have contracts in support of these commitments or not?

A. Well, I have even deviated—usually the office procedure is to have a wire of confirmation; after you make a deal on the phone, have the buyer send a wire of confirmation. But I haven't asked for a wire of confirmation in about seven or eight months, because if the people don't play fair with me, I don't play fair with them, because their word [327] is their bond and my word is my bond.

Q. What about remittances? How are they handled?

A. We usually ask for a 50 per cent deposit on a name band. We send a telegram, or, rather, send a contract prior to the band's appearance, and the promoter sends 50 per cent as a deposit of the price for the night, whether it be in cashier's check, money order, or personal check. If we recognize the promoter we let him send a personal check.

(Testimony of William McDonald)

Q. From wherever the ballroom operator happens to be located,— A. Yes, sir.

Q. —to your office in Beverly Hills?

A. Yes, sir.

Q. Now, during the war-time bands also traveled by air, didn't they? A. Yes.

Q. Tell us about that.

A. Well, during war-time there was an emergency existing where it was impossible at times to secure transportation by the medium of train or bus, due to the movement of troops, et cetera. So in order to co-operate with the Army and Navy morale, where the morale officers might have a very big problem in having a group of men living up in the hills, far away from everybody and seeing no one but each other, and away from their families, and not being overseas as they wanted to [328] be, most of them, it became increasingly necessary to move bands by Army and Navy transportation. So we co-operated in every way, and in lots of instances we would give them a band free, or we would make them pay if it was necessary to travel the band a further distance than prescribed by the International Musicians laws.

Q. And the booking agencies arranged that transportation?

A. We co-operated with the Army and Navy, yes.

Q. And got them to furnish the transportation for the bands? A. Yes, sir.

The Court: Mr. McDonald, did you say "International Musicians laws"?

The Witness: It would be the American Federation of Musicians.

(Testimony of William McDonald)

Q. By Mr. Christensen: That was the general practice among the agencies, was it, sir?

A. Yes, we all did it. It was more or less a matter of co-operating with the Army and Navy.

Mr. Christensen: You may examine, Mr. Doherty.

Cross-Examination

By Mr. Doherty:

Q. Mr. McDonald, you know something about the operation of that famous band known as the Billy McDonald band? [329]

A. I was familiar with it.

Q. You were the band leader, were you not?

A. Yes, sir.

Q. And you played here and in other sections of the United States as a band leader? A. Yes, sir.

Q. You are known as the Billy McDonald band here and across the country? A. No, sir.

Q. Didn't you play in other sections than Los Angeles?

A. I played in Seattle, San Francisco, Shreveport, Louisiana, and back to Los Angeles, and then I went to Honolulu.

Q. And it was known as the Billy McDonald Band?

A. That's right.

Q. And you were the leader? A. That's right.

Q. You were quite proud of it, weren't you? [330]

A. That remains dubious. Individually, yes; commercially, no.

Q. Were you with Mr. Finley when Henry Busse was engaged? A. Yes, sir.

(Testimony of William McDonald)

Q. On what date was that?

A. I believe most of the phoning took place from my office a couple of months or about six weeks prior to my going with Mr. Finley. Now, I won't say for sure, but I believe that was it.

Q. Six weeks before you went with Mr. Finley?

A. Yes, sir.

Q. That would be along about, then, the middle of November?

A. I won't say definitely. Let's say approximately.

Q. You were with Mr. Finley in the latter part of December, 1944?

A. Well, I can explain better by saying that Mr. Finley started to buying attractions as soon as he secured the lease on Mission Beach. If you could tell me when he secured the lease, then it was after that.

Mr. Doherty: I think that November the 8th the lease was awarded, was it not?

Mr. Christensen: I believe that is correct, sir.

Q. By Mr. Doherty: November the 8th, 1944, was approximately the date that Mr. Finley secured the lease. He began buying attractions immediately thereafter?

A. He began trying to attempt to set up his opening day. [331]

Q. Then was it immediately after that he began conversing with Henry Busse?

A. I wouldn't say immediately after. The first thing he had to do was to fix up the park. After he got that all out of his mind, then he started worrying about his attraction for opening. His opening attraction, that was his big problem.

(Testimony of William McDonald)

Q. After he got the lease, the first thing he concentrated on was remodeling the park?

A. A complete remodelization of the whole park.

Q. How long a time did that take?

A. I would say that took his time, setting plans, for about a couple of weeks; and then, after that, intermittently, why, he was on it all the time.

Q. Then, would you say it was a fair statement to say that Mr. Finley began about December the 1st, 1944 to take an active part in arranging for attractions, bands for his Mission Beach?

A. Well, I would say he levelled off about a week before that and really started trying to get attractions for Mission Beach.

Q. Was that about the time he commenced conversing with Henry Busse about engaging him for the Mission Beach?

A. The picture was that he attempted to get attractions from every agency that was of national prominence—not attractions—I would say a name band. [332]

Q. Now, if you remember my question, was it then around about December 1st that he attempted or started negotiations—

A. No; the latter part of November. He immediately started trying real hard when he found out it was going to be a difficult problem. Before that he had made inquiries.

Q. When did he begin to contact Henry Busse through your office or otherwise?

A. He never contacted Henry Busse through my office. He did not have an office in town, and we gave him some office space and let him use it.

(Testimony of William McDonald)

Q. And he telephoned from your office?

A. Yes, he did.

Q. To Henry Busse?

A. He telephoned to the agent of Henry Busse.

Q. And when was the deal closed that Henry Busse was to appear at Mission Beach? Give us the date as near as you can.

A. I believe about—we finally, through a series of events and through a big hunk of money, got Mr. Busse to appear about four weeks before, I believe, the official opening of the ballroom was.

Q. The official opening of the ballroom was February the 3rd, 1945.

A. Was that it? I don't know. [333]

Mr. Doherty: That is agreed, is it not?

Mr. Christensen: That is, sir.

Q. By Mr. Doherty: And then, you would say about January the 5th or 6th, 1945, that he finally closed the deal with Henry Busse to open?

A. When he was told that was the only band that was made available to us, and I don't know what bands were available.

Q. Now, you have had long experience in booking bands, have you not?

A. No, sir; I have not.

Q. Well, you have learned something during the past year in that respect.

A. I have learned a lot.

Q. And you just can't push a button and get a band on a day's or week's notice, can you?

A. You can get it on a 30-day notice.

Q. Depending upon the band? A. Yes.

(Testimony of William McDonald)

Q. These bands of prominence travel about the United States on bookings, do they not? A. Yes.

Q. And when they are making long trips, like from the East Coast or the central states into the Pacific Coast, they must be assured of an engagement long enough to pay the expenses of the trip here to this point and back again, do [334] they not?

A. That is usually the procedure.

Q. And when you have one of your bands on the East Coast or middle west, and you want to bring that to the West Coast, you must book them up for a period of weeks as an inducement for them to come? A. Yes.

Q. And that takes time, doesn't it?

A. It is according to how big the attraction is.

Q. I am speaking now about a band.

A. Or how big the band is—I will follow it through.

Q. Well, take a name band of 20, 25 or 30 pieces.

A. Well, I don't know how other offices work, but I know that we try to keep an equal number of bands in each territory with my organization, so that each office will have approximately the same income, if possible.

Q. But it takes time, does it not—sometimes weeks to line up a territory for a band in your area?

A. Well, a tour of one-nighters, it is according to how long the tour is. If you only have 14 or 15 days, the thing should be tied up in about 8 days.

Q. That is one-nighters? A. Yes, sir.

(Testimony of William McDonald)

Q. But where you are going to have a band to come and play at one place for a week, and then another place for a [335] week, and then another place for a weekend, that is, Friday, Saturday and Sunday, and then another place for a week, up and down the Coast, how long a time does it take to make those bookings, starting out from scratch?

A. What kind of a band, a name band or a semi-name band?

Q. Yes; we are only talking about bands here.

A. A name band, you book—well, if a band is coming out to do a picture, you usually have about a 45-day notice on a picture.

Q. Yes.

A. At which time you immediately start bringing the band out and, as gracefully as possible, getting out of contracts you have with other buyers, because you have already protected yourself by the 45-day clause of cancellation.

Q. That is a moving picture engagement. That is a name band. Now, what about a dance hall engagement; how much time must you have to line up a booking or a tour of a name band in your territory from Denver west, where you will keep them engaged for a time which will warrant you, as their agent, and the band leader, as the employer of the band, to come from the East Coast to the West Coast?

(Testimony of William McDonald)

A. Well, having dealt with most semi-name bands, I would say a name attraction—let's see; I will go back out—a name attraction, usually two months ahead of the thing.

Q. About two months ahead? [336]

A. Six weeks to two months.

Q. Yes.

A. Or you are not a very good operator.

Q. Can you tell us—and I want to use this next minute on this—when the band passes from a semi-name band into the prominence of a name band, just when that occurs?

A. Well, I think the best authority on that are the buyers. When you find every buyer in every part of the country wanting the band at the same time, then you have a name band.

Q. That is the determining factor?

A. That is one of the determining factors, the most important, I believe, from my point of view.

Q. That is when the buyer wants the band very badly—

A. When a group of buyers want the band; in other words everyone is clamoring for the band, then you can be assured that you have a name band.

Q. That is a name band. You have answered that question so promptly, I will take you on one more. You spoke about bands becoming name bands because they are on radio. Now, some of the bands that are on the radio

(Testimony of William McDonald)

are not dance bands, are they, and they have national prominence?

A. Well, the words "national prominence," I would have to know. There are lots of bands on the air that you could ask anybody who they are that is even musically minded and [337] they wouldn't know, although they are of some prominence, radio prominence.

Q. But aren't there some bands on the air that are not dance bands? A. Yes.

Q. And they may have national prominence?

A. I would say maybe about ten per cent of the bands on the air might have national prominence.

Q. That are on the air?

A. In the present day.

The Court: I think we will recess now, gentlemen.

The Witness: All right, sir.

The Court: Two o'clock this afternoon, ladies and gentlemen.

Mr. Christensen: 2:15.

The Court: Oh, pardon me just a minute. Mr. Christensen did ask yesterday. He said he had another appointment. So, if you are here at 2:15, but please be here at 2:15, not 2:20 or 2:17.

Please remember the admonition in the mantime.

(Whereupon, a recess was taken until 2:15 o'clock p. m. of the same day.) [338]

Los Angeles, California, Thursday, January 31, 1946.
2:25 p. m.

The Court: All present. Proceed.

I guess I am the one that should apologize. Isn't that right? It is now 2:25.

Mr. Doherty: Mr. McDonald, will you take the stand again, please?

WILLIAM McDONALD,

called as a witness by and on behalf of the plaintiff,
having been previously duly sworn, resumed the stand and
testified further as follows:

Cross-Examination (Continued)

By Mr. Doherty:

Q. Mr. McDonald, I believe you had answered the last question. You testified in your direct testimony respecting the splitting of commissions. Do you know the Orrin Tucker band? A. Yes.

Q. I believe that was a band that was represented by your company, and they wanted to go to the M. C. A.?

A. That was before I was affiliated with the company.

Q. Before your time with the company?

A. Yes.

Q. That was a band upon which you are splitting commissions now, is it not? [339]

A. To my knowledge, no.

Q. To your knowledge, no. You mean that you do not know whether they are or are not, or, they are not?

A. To my knowledge, Music Corporation of America has the Orrin Tucker band under exclusive management contract.

(Testimony of William McDonald)

Q. And do not split commissions with you?

A. Not that I know of, no.

Q. You haven't had occasion to check the arrangements made between M. C. A. and your company with that band?

A. No, I have had no occasion at all.

Q. In other words, it is possible that you are splitting commissions and you would not know about it?

A. Very possible.

Q. Mr. Christensen spoke to you, or, rather, asked you on several occasions about bands available in the San Diego area in 1945. You never kept bands in what is known as the San Diego area at any time, did you?

A. A traveling band is a traveling band. They should be made available when requested, if you can make it available when it is requested; or, you can request that they book the band and make sure that you deliver the band.

Q. Yes. Your area is west of Denver?

A. Right.

Q. And you did have bands west of Denver that were available for use in 1945 by Mr. Finley at Mission Beach that [340] he did not use; isn't that right?

A. No, it is not correct.

Q. I thought I understood you to say this morning that you had some bands that were not placed at Mr. Finley's Mission Beach in 1945?

A. No. We didn't—so far as I can remember, during the summer of 1945 Mr. Finley was very well booked up with top semi-names and name bands, and there was no opening during the summer for anybody else to get in, I believe. I think I am quoting right. And at the time I had nothing available anyway.

(Testimony of William McDonald)

Q. In other words, knowing that he was booked fully during the spring and summer of 1945 you didn't route any of your bands so they would touch San Diego?

A. I had a request for a name band, the band of Georgie Auld, whom I could not deliver to him.

Q. That was the only exception?

A. That would be the only exception.

Q. That was a pretty good band, wasn't it?

A. I thought it was a good band.

Q. During the— I might go back a minute to clarify it. While you were there in your capacity as manager, the arrangement was that you were going to operate at Mission Beach during February, March, and up to May 11th on a two-night-a-week basis, was it not? [341]

A. That is right.

Q. Then beginning May 11th on up through and to probably October you were going to operate on a five- or six-night-a-week basis?

A. You must understand that was a proposed schedule. I left him after a month.

Q. When you left in early February, 1945, how far ahead did Mr. Finley have bookings on the two-night-a-week engagements up to May 11th?

A. He had intermittent bookings through.

Q. He had what?

A. He had bookings spaced on through, when they were available, and he had some holes to fill in.

Q. He had some holes to fill in?

A. Yes. In other words, he had, say, the first and second weeks booked, and he had the third and fourth weeks booked, and then he had the fifth and sixth open. [342]

(Testimony of William McDonald)

Q. And then, later, he filled in the entire summer engagement? A. Yes.

Q. During that period your company furnished him with Wingy Manone? A. Yes.

Q. That was on February 17th and 18th?

A. The dates I couldn't vouch for.

Q. How is that?

A. He did play for Mr. Finley.

Q. And then, later, on March 10th and 11th, you furnished him with Ada Leonard? A. Right.

Q. On March 31st and April the 1st you furnished him with Carlos Molina?

A. I am not vouching for the dates, but Carlos did play there.

Q. Without vouching for the date, you also furnished him with a band known as the Chris Cross?

A. Yes, sir.

Q. And also with Pinky Tomlin?

A. I can't remember whether Pinky played the Beach. He did play at another ballroom that Mr. Finley has under control.

Q. And other engagements were furnished by other [343] agencies? A. Yes, sir.

Q. That is, General Amusement and the William Morris Agency? A. Yes, sir.

Mr. Doherty: I think that is all, Mr. McDonald.

Q. By Mr. Christensen: None of these bands which you have just been asked about—

Mr. Doherty: Pardon me. There is one question, your Honor, I made my mind up I was going to ask him and I did not.

Mr. Christensen: Go right ahead.

(Testimony of William McDonald)

Q. By Mr. Doherty: In this matter of agency, each engagement that you make for a band leader to play at a particular dance hall is a separate contract for each engagement, is it not? In other words, you have A band playing in a particular place; you make a contract between A band and the dance hall proprietor; then B band comes in and you make another contract between the B band leader and the dance hall; in other words, in each instance it is a separate contract?

A. Yes; because, in each instance the band leader has to O.K. a job before it is filled.

Q. Yes.

A. We have no right to force a band leader to play.

Q. You cannot force him to play a job?

A. That is right. [344]

Q. Under the American Federation of Musicians or under the Musicians' Union? A. That is right.

Q. Each engagement is a separate and distinct contract? A. That is right.

Q. And each approved by the individual band leader in each instance, or when he authorizes you to do it for him? A. That is right.

Mr. Doherty: Thanks.

The Court: Proceed, Mr. Christensen.

Re-Direct Examination

By Mr. Christensen:

Q. None of these bands which you have just named are name bands, are they, sir?

A. Some of them are not even semi-names.

Q. For example, you were asked if you furnished Wingy Manone—Manone, I believe, is the pronunciation?

A. Yes, sir.

(Testimony of William McDonald)

Q. You know at that time Pacific Square was playing Ted Lewis, don't you?

A. Yes. I was fairly well set up with the policy down there.

Q. And you know that part of the time when Mr. Finley was playing Sally (Sully) Mason—Sully Mason it is—he was also playing against Ted Lewis [345]

A. In all probability. I don't know for sure.

Q. You furnished Ansil Hill to Mr. Finley?

A. No, sir.

Q. You furnished Chris Cross? A. Yes, sir.

Q. And do you know that at that time that Music Corporation of America furnished to the Pacific Square Charles Burnett?

A. Yes, sir. Chris Cross was bought under a circumstance that Mr. Finley couldn't get bands at the time, so he just bought the band to fill in the dance time. He had to have the hall open and he had to have dance music for the evening; so he bought the dance band. There was no sale; it was just a buy.

Q. And Charles Burnett is one of the top bands in the country?

A. One of the leading bands in the country.

Q. You have had an opportunity to observe Mr. Finley's operations of ballrooms? A. Yes.

Q. What is your opinion of him as a ballroom operator?

Mr. Doherty: Just a minute. I think I will object on the ground that this witness is not qualified, no foundation laid.

The Court: I think he is qualified to give an opinion [346] on that, but that really is not a matter of

(Testimony of William McDonald)

opinion; that is a factual matter. What he did in the management or proprietorship of a ballroom; that is not a matter of opinion. The way the question is framed is objectionable. Sustained.

Q. By Mr. Christensen: Did you observe Mr. Finley's operation of Mission Beach? A. Yes.

Q. What was it?

A. Well, he came out and took a dance hall that was very badly deteriorated as to the cash money up to that time. I understood it was for the people of San Diego, as well as from the personal point of view, making the place more beautiful, to make it attractive for big bands to play there and to give people a reason to go into a place that didn't look as bad as it did.

Q. Did he do that? A. He did that.

Q. And after he had completed the work on the Mission Beach ballroom, would you say then that it was a first-class ballroom?

A. Yes, I would say it was; and prior to that he took another ballroom and made it a very nice ballroom, which was the Trianon, prior to coming into Mission Beach.

Q. In looking over his list of attractions I notice one of the names of the persons you say would be available to [347] him was Bolita? A. Right.

Q. Bolita is an ice skater, isn't she?

A. She is a dancer. She was doing a dancing act in vaudeville at the time.

Q. Is it good practice to have such a person appearing with a band in a ballroom?

A. Well, at the time, as stipulated before, Mr. Finley was having a hard time getting bands, so the only other thing he could turn to, to have a reason for people to

(Testimony of William McDonald)

travel out to the beach would be to get some theatre star that somebody would like to see in person. At the time, Bolita just completed a picture and they gave her a lot of publicity on it, and there might have been a reason for him to book her, though he didn't book her because he didn't think her draw was big enough.

Q. You said that Mr. Finley was booked up for a period of time, of course, intermittently? A. Yes.

Q. None of those were with name bands, were they, at that time?

A. Well, prior to his summer engagements, no; he played what he could obtain.

Mr. Christensen: I believe that is all; and thank you very kindly. [348]

Re-Cross Examination

By Mr. Doherty:

Q. Mr. McDonald, you were not at the Mission Beach ballroom at any time after Mr. Finley began to operate it as such, were you?

A. I was very close to Mr. Finley up—

Q. No. Answer my question. Were you there, employed there in any capacity after Mr. Finley began operating it as a ballroom? A. No, sir.

Q. When you wrote this letter, which is Defendants' Exhibit D, did you have the same opinion of the orchestras that you have now expressed on the stand?

A. Yes. I expressed on the letter here, expressed—it is nothing about the orchestras. I have name attractions.

Q. I turn to the next sheet, which is the first two lines following the list of the orchestras, and ask you about the following sentence: "The foregoing is a partial list of some of our larger names, and when the time comes

(Testimony of William McDonald)

we can give you many more to choose from." Now, were not these your larger names that were represented by your agency?

A. I see one of our top bands represented there.

Q. Then, your statement to Mr. Finley that "This is a partial list of some of our larger names," was not a correct statement at that time? [349]

A. Yes; it was a correct statement, because at that time we were in litigation which, if it failed, would have given us control of many larger names.

Q. In other words, at that time you did not have other large names represented by your company?

A. At that time, we had, with the exception of one, no names represented by our company; a few semi-names and a lot of orchestras.

Q. Then, did you mean what you said here in this letter to Mr. Finley: "You, of course, realize we are one of the four largest agencies in the business today?"

The Witness: Read the rest of it.

Q. Oh, fine. "And the above is only a partial list of the attractions we can offer you when the time warrants," the above being the list of all the bands.

A. I conclude that sentence. It says right here: "Also I am listing a few of the names that will be available to you:" and there is listed a few movie stars. And then I say: "Larry, I hope the above list, which is only a partial list of the artists,"—which it was. We have Allan Jones to our contract and we have several names.

Q. Are you not one of the largest agencies in the business? A. I am quite sure we are.

Q. You are? [350] A. Yes.

(Testimony of William McDonald)

Q. And General Amusement Corporation is another?

A. Yes, sir.

Q. And William Morris Agency the third?

A. Yes, sir.

Q. And Music Corporation of America fourth?

A. Not in that order.

Q. Of the big four?

A. I would say that, sir.

Q. Yes. And at that time you did not have any more talent than you said here on the stand today; that was your largest selection of talent that you had available?

A. Within our grasp at that time; you are right.

Q. But after that, your situation improved?

A. We were quite sure it would improve. However, some litigation fell through, which it did not improve.

Mr. Doherty: That is all.

Re-Direct Examination

By Mr. Christensen:

Q. Oh, Mr. Doherty asked you if your employment—if you were there employed after one month. But were you down there at times?

A. I was down there regularly, yes, two or three times a week, because I was booking bands at his other spot of amusement, which was the Trianon ballroom. [351]

Q. So that even after you ceased working for him, you continued to visit with him once or twice a week at the Mission Beach ballroom?

A. I would say once or twice a week.

Mr. Christensen: That is all, Mr. McDonald.

Mr. Doherty: That is all.

Mr. Christensen: Thank you. Mr. Charles Wick, please.

CHARLES WICK,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Charles Wick.

Direct Examination

By Mr. Christensen:

Q. Mr. Wick, by whom are you employed?

A. The William Morris Agency.

Q. That is one of the agencies we have just been speaking of here, isn't it? A. Yes.

Q. And your position with the William Morris Agency, sir, is what?

A. I am in charge of the orchestras at their agency.

Q. For what period of time have you been so employed by the William Morris Agency, sir? [352]

A. About 15 months.

Q. Can you tell me the number of name bands which you had available to operators in the San Diego area during the year 1945?

A. We had three white name bands and two colored name bands, a total of five.

Q. Will you name them for us, please?

A. Henry Busse, Vaughn Monroe, Artie Shaw are the white bands; Count Basie and Duke Ellington are the colored bands.

Q. Artie Shaw was not with you the entire year 1945, though, was he?

A. No. He left us in September, 1945.

(Testimony of Charles Wick)

Q. When Artie Shaw left you or your organization, do you know by whom he became associated?

A. Yes; he became associated with M. C. A.

Q. Music Corporation of America? A. Yes.

Mr. Christensen: You may examine, counsel.

Cross-Examination

By Mr. Doherty:

Q. What area does your agency cover, the San Diego office—rather, the Los Angeles office?

A. The Beverly Hills office covers the western states west of Denver; approximately Montana, Utah, Washington, [353] Oregon, California, Nevada, Arizona.

Q. During 1945 did the Army and Navy make very heavy demand on you for bands?

A. You mean to appear at their camps?

Q. Yes; where you had to fill in engagements for the Army and Navy?

A. We never had to fill engagements for the Army and Navy. They were always requests, and usually they were desirable from the standpoint of facilitating the orchestras' transportation during which time transportation was very difficult to obtain.

Q. Did you ever use them in the Army and Navy camps on Saturdays and Sundays?

A. No.

Q. In other words, you would use the Army and Navy for transportation to get them into the area, and then you performed for the Army and Navy weekday nights?

A. Usually, yes. It would depend upon the particular camp's position in the particular direction that the orchestra was traveling.

(Testimony of Charles Wick)

Q. Do you have any classification in your office as the San Diego area or the area in which bands are available? A. Not officially.

Q. In other words, you have bands available anywhere in the United States if you have spots at which to put them that will justify their moving? [354]

A. They can be made available, yes.

Q. In other words, sometimes you have more bands in New York than you do in Los Angeles, and other times you may have more bands on the West Coast than you have in the Chicago area?

A. It would be possible. Ordinarily, no.

Q. But the bands move about?

A. Yes, they do.

Q. And you try to keep them booked the best you can, but there is no assurance at any time that you will have a certain number of bands in any given area?

A. There is no assurance other than what we choose to do about the demand.

Q. Some bands like to play on the Coast and others like to play in the East?

A. That would not be the prime consideration. They like to play where they can make the most money and contribute to their career.

Q. In other words, wherever you have enough engagements or make them a good enough offer, they will come?

A. If it is desirable from the standpoint of advancing them as an economic functioning unit.

Q. Did you say that Monroe is one of your bands?

A. Yes, sir, he is.

(Testimony of Charles Wick)

Q. Do you know where that band was playing on February [355] 3rd and 4th, 1945?

A. I believe they were at Pacific Square Ballroom in San Diego.

Q. You represent Henry Busse, too, don't you?

A. Yes.

Q. Where was that band playing on February 3rd and 4th, 1945?

A. I believe, if those are the correct dates, if that was a week-end, he was playing in Mission Beach Ballroom at San Diego.

Q. In other words, the Monroe band was playing over at Mr. Dailard's place, at Pacific Square? A. Yes.

Q. On that week-end? A. Yes.

Q. And your represent the Monroe band, don't you?

A. Yes.

Q. And you had the other band over at Mission Beach that same week-end? A. Yes, sir.

Q. In other words, you had your organizations in the two top places in San Diego that week-end?

A. Yes.

Mr. Doherty: That is all. [356]

Re-Direct Examination

By Mr. Christensen:

Q. I would like to inquire, Mr. Wick, you are acquainted with the Vaughn Monroe band, aren't you?

A. Yes.

Q. The Vaughn Monroe band has as an integral part of it the Norton Sisters, does it not? A. Yes.

Q. Tell me what they are.

A. The Norton Sisters is the name for four girls who sing as an attraction with the Vaughn Monroe orchestra.

(Testimony of Charles Wick)

They sing as a unit, and they sing with the band. They are one of the featured groups in the organization.

Q. Are you also acquainted with the King Sisters, an attraction? A. Yes.

Q. Do you know that they were playing also at the same time and with the same band at Pacific Square?

A. Yes.

Q. Do you know how Mr. Finley happened to have Busse? Do you know anything about the deal?

A. I remember that at that particular time Henry Busse had just closed at the Palace Hotel in San Diego.

Mr. Doherty: In San Francisco.

Q. By Mr. Christensen: In San Francisco. [257]

A. Yes. I am sorry. I didn't mean to move that hotel. And he was feeling very, very sick. I believe he had an infection and wanted to take some time off, and I believe about ten days or two weeks before the engagement in San Diego the amount of money that Jack Flynn, who at that time had the band under contract, was able to secure for him was the inducement that got him to forego his period of recuperation or vacation and play for him down there.

Q. For Finley? A. Yes.

Q. Did you split any commissions on the booking of Busse with Finley?

A. Split commissions with whom?

Q. With anybody at all.

A. Not to my knowledge.

Q. Did you have to on the Monroe booking?

Mr. Doherty: That would call for his conclusion, your Honor, as to whether or not he had to.

(Testimony of Charles Wick)

Q. By Mr. Christensen: Well, did you?

A. Well, I don't— I know they did. However, I myself did not make that arrangement.

Q. Do you know who the Monroe booking was made with? In other words, was it made with Bishop, or was it made direct with Dailard?

A. That again I do not know. I am reasonably sure it [358] was made with Bishop, but, again, I did not make it myself at that time.

Mr. Christensen: I see. Thank you very much, Mr. Wick.

Mr. Doherty: That is all.

Mr. Christensen: You may step down.

(Witness excused.)

Mr. Christensen: I want to call Hal Howard, one of the representatives of M. C. A., for cross-examination at this time.

HAL HOWARD,

called as a witness under Rule 43-B of the Rules of Federal Procedure, having been first duly sworn, was examined and testified as follows:

Cross-Examination

The Clerk: Will you state your name, please?

The Witness: Harold Howard.

By Mr. Christensen:

Q. Mr. Howard, you are employed, are you not, by Music Corporation of America?

A. That is correct.

Q. And you have been now for what period, sir?

A. Since September, 1944.

(Testimony of Hal Howard)

Q. Do you recall the booking of Paul Martin by Larry Finley? A. I do. [359]

Q. Was that in January of 1945, sir?

A. I believe it was.

Q. Did you have anything to do with it?

A. I did.

Q. What did you have to do with it?

A. I made the arrangements with Mr. Finley for the booking of the band.

Q. Did you prepare the contract, sir?

A. I did.

Q. Was it on a Music Corporation of America form?

A. It was not.

Q. What form was it on?

A. American Federation of Musicians.

Q. Why, if you know, wasn't it on a Music Corporation of America form?

A. I was requested by Mr. Barnet of our band department to put it on a form of the American Federation of Musicians.

Q. Do you recall the conversation?

A. I don't recall the exact conversation. I was just advised by him to put it on that type of form.

Q. He did not tell you why? A. He did not.

Q. Did he also instruct you to tear off the edge of the Music Corporation of America's photographs, the photograph [360] publicity stills, and the name or the initials "M. C. A."? A. He did.

Q. Did you do it?

A. Yes, I advised the publicity department to do that.

Q. That is, you did that before furnishing them to Mr. Finley? A. That is correct.

(Testimony of Hal Howard)

Q. Did Mr. Barnet say to you and to Mr. Finley at that time that he wanted you to take the name "M. C. A." or the initials "M. C. A." off because he did not want to get in wrong with Mr. Dailard?

A. I am not sure of that. I don't recall a conversation to that effect at all.

Q. Do you know if that band was offered to Dailard?

A. The band had previously played for Wayne Dailard?

Q. How long before that time, sir?

A. I am not aware of that.

Q. In the make-up of a name band, there are many factors, are there not, sir?

A. I would say there are.

Q. And some of those would be the general appearance of the band, that is, whether it is presented in an attractive manner, the way in which the solos and specialties are prepared, so that they would be shown to the best advantage?

A. That would be possible. [361]

Q. And would you include within that the costumes or uniforms?

A. They might also contribute to that.

Q. Would you not say that that would be a very definite part, or, a definite part of that?

A. It wouldn't be the predominant part. It could be a part of it.

Mr. Christensen: That is all I wanted to ask you on cross-examination, sir.

Mr. Doherty: Just two or three questions of this witness, so he will not have to come back again.

(Testimony of Hal Howard)

Re-Direct Examination

By Mr. Doherty:

Q. Mr. Howard, you are familiar with the Music Corporation of America form of contract with dance halls? A. I am.

Q. And you are familiar with what is known as the Musicians Union form of contract? A. Yes, sir.

Q. Now, is there any difference between the contents of the contract, one from the other?

A. No, the contents are identical, the only difference being that the form used by Music Corporation of America, or any agency, has their name printed on the top.

Q. The wording of the contract is identical? [362]

A. That is correct.

Q. Now, the Martin band that you talk about is a band which has a contract authorizing M. C. A. to represent it? In other words, it is a band that is represented by Music Corporation of America?

A. That is correct.

Q. It was placed at one time in the Pacific Square Ballroom, and the incident you are now speaking about is where you placed it in Mr. Finley's ballroom?

A. That is correct.

Mr. Doherty: That is all.

Re-Cross Examination

By Mr. Christensen:

Q. Isn't that the only instance that you recall where a contract was prepared on an A. F. of M. form?

A. That is my only experience of that nature.

Mr. Christensen: Thank you.

I would like at this time, your Honor, to introduce the deposition of

KENNETH LATER,

who was an employe of Music Corporation of America, and who is now not available here.

Mr. Doherty: May I have a moment on that, if you please, your Honor?

Mr. Warne: Here it is, Mr. Doherty.

The Court: The original is here in the file. I don't know whether that one was filed here or not. I don't [363] remember that deposition.

The Clerk: Kenneth Later?

Mr. Christensen: Yes, sir.

The Clerk: Yes, it is.

The Court: Do you want to read it all, Mr. Christensen?

Mr. Christensen: Yes, I think so, to give the continuity of it. May I ask Mr. Jaffe to read it, please?

Mr. Doherty: I don't know what your Honor's custom is. Shall he sit in the witness chair?

The Court: Yes. One of you can take the court's copy, if you desire, and follow it by question and answer.

Mr. Christensen: Will you do it, Mr. Karp? You take my copy and read.

The Court: You can take the court's copy. It doesn't make any difference. Were there any corrections? I don't remember whether there were.

Mr. Christensen: I don't remember any, your Honor.

The Court: If there were any, they would be noted in the original, and you can call attention to it, Mr. Christensen.

(Deposition of Kenneth Later)

(The deposition referred to was read by Mr. Jaffe in words and figures as follows, to-wit:)

Mr. Jaffe: This is direct examination by Mr. Desser:

"Q. Mr. Later, where do you reside?

"A. 200 West 54th Street.

"Q. That's New York City, is it not? [364]

"A. Yes.

"Q. Do you have a telephone there?

"A. Yes.

"Q. What is the telephone number?

"A. Circle 7-1130.

"Q. Where are you now employed?

"A. The William Morris Agency.

"Q. What is the nature of your present employment?

"A. I am a theatrical agent.

"Q. Were you ever employed by the Music Corporation of America?

"A. Yes.

"Q. Between what dates were you employed by the Music Corporation of America?

"A. I left the employ of the Music Corporation about February 1st or 10th of 1945.

"Q. For how long prior to that date were you employed by them?

"A. About ten months.

"Q. And in what office were you employed?

"A. In the Beverly Hills office.

"Q. Beverly Hills, California?

"A. Yes.

(Deposition of Kenneth Later)

"Q. In what capacity were you employed by the [365] Music Corporation?

"A. As a theatrical agent. I booked talent into theatres, night clubs—

"Q. Acts and attractions—is that generally what you had charge of?

"A. Yes.

"Q. And your duties generally were booking house acts and attractions into the various places of entertainment; is that true?

"A. Yes.

"Q. Do you know the plaintiff, Larry Finley?

"A. Yes.

"Q. How long have you known Larry Finley?

"A. I think since about the first of the year, perhaps a little before; I don't remember exactly the date.

"Q. You are talking about 1945, aren't you?

"A. Yes.

"Q. Where was it that you first met Larry Finley?

"A. At the office of M. C. A.

"Q. In Beverly Hills, California?

"A. Yes.

"Q. Did you have a discussion with Larry Finley at that time?

"A. Yes. We discussed—

"Q. Just answer that Yes or No. [366]

"A. Yes.

"Q. Who was present during that conversation?

"A. I think Hal Howard.

"Q. Who is Hal Howard? What is his employment?

"A. Hal Howard was in the Band Department of M. C. A.

(Deposition of Kenneth Later)

"Q. Likewise in the Beverly Hills office?

"A. Yes.

"Q. Now, can you relate the conversation that you had with Larry Finley at that time, on the occasion of your first meeting.

"A. We discussed some attractions for the Mission Beach Ballroom.

"Q. What attractions did you discuss?

"A. We discussed a great number of attractions and, from the attractions we discussed, we came down to a few that might be possibilities.

"Q. Will you relate as nearly as you can the conversation that took place between you and Larry Finley and Hal Howard, if Howard was present during the conversation at that time?

"A. Well, this is not by any means an exact relating of the conversation, since I wouldn't remember that. However—

"Q. (Interposing) The substance of it will be [367] sufficient, Mr. Later.

"A. We discussed the putting in of box-office attractions at the Mission Beach Ballroom.

"Q. May I interrupt just a moment. Before you go on with the conversations, will you tell us just what you mean by an attraction?

"A. I would describe an attraction as one which would increase the box-office receipts.

"Q. Can you give us an example of what you consider an attraction?

"A. As we are discussing it here, I would say any good act is an attraction. However, what I am talking about here is an attraction which would have some value as attracting business.

(Deposition of Kenneth Later)

"Q. You mean a theatrical act or attraction?

"A. Yes.

"Q. Or theatrical entertainment. Is that true, Mr. Later?

"A. Yes.

"Q. And one that would attract box-office receipts would be something like Sinatra or Bing Crosby?

"A. Yes.

"Q. You would call those attractions; is that right?

"A. Very great attractions.

"Q. The King Sisters? [368]

"A. Well, they are an attraction, but not comparable with Sinatra or Crosby.

"Q. Now, do you remember whether or not anyone was with Larry Finley during the time of this conversation?

"A. You mean besides Hal Howard?

"Q. Yes.

"A. No, I don't.

"Q. All right. Now go ahead with the conversation, Mr. Later.

"A. We discussed many attractions, and among the attractions that we discussed were the King Sisters, and Larry O.K.'d the booking of several of these attractions.

"Q. Mr. Later, may I interrupt. To make your evidence permissible it is necessary for you to say 'Mr. Finley said that', 'I said that.' If you will just give us the substance of what Mr. Finley said and what you said, that is what we want; not the ultimate conclusion that

(Deposition of Kenneth Later)

was reached, but the conversation that led up to the ultimate decision. Do you follow me?

"A. Yes. Well, I had a list of all of the M. C. A. attractions, and also some other people's attractions, who might have been available for engagements at Mr. Finley's ballroom, and we discussed them and agreed on—

"Mr. Desser: Off the record— [369]

"(Discussion off the record.)

"A. (Resuming) Well, Mr. Finley told me that he was most anxious to buy some attractions to bring some box-office value, since he had been unable to buy bands with any great name value, and that the combination of acts and bands might bring the result that he felt he might not obtain without them. Mr. Finley, and I and Hal Howard went over quite a list, a large list, of names; from these Mr. Finley agreed that several of these would be acceptable to him.

"Q. By this list you refer to you mean a list of attractions for whom Music Corporation of America was the booking agent?

"A. Yes.

"Q. All right, now continue.

"A. Most of all Mr. Finley was anxious to get Sinatra, and when we found it impossible to get Sinatra we went on to several of the other attractions, and we finally arrived at the availability of two acts that were acceptable to Mr. Finley, they being the King Sisters and Bonita Granville.

"Q. I see. What discussion took place between you and Mr. Finley concerning the King Sisters and Bonita Granville.

"A. 'Honestly don't remember that discussion. [370]
I remember the final result.

(Deposition of Kenneth Later)

“Q. Just give us the substance of the conversation, as nearly as you can remember it.

“A. I remember that I suggested that both attractions be used on one week-end, and Mr. Finley said that he felt they would be too expensive for him, and so it was agreed that we would try to get the King Sisters for the date that he wanted them. I don't remember the exact date—some date in February.

“Mr. Ross: May I interrupt? Was this all discussed at the same conversation that you had at that time?

“The Witness: Oh, no; as a matter of fact, we had a couple of telephone conversations.

“Mr. Ross: Well, I want to keep this record straight. If we are talking about the first conversation, we only want what happened at that meeting.

“Q. During the first conversation.

“A. Well, I would say the first conversation was completely limited to a discussion of people whom Mr. Finley would find acceptable if they were available and satisfactory financial arrangements could be made.

“Q. And did Mr. Finley at that time give you a list of attractions which might be satisfactory to him, the names of which he selected from the list that you showed him? [371]

“A. Yes.

“Q. And included among that list that he gave you were the King Sisters and Bonita Granville; is that right?

“A. Yes.

“Q. The King Sisters is what kind of an act?

“A. The King Sisters are a singing act.

“Q. A trio, is it not?

“A. No; four girls.

(Deposition of Kenneth Later)

"Q. Four girls?

"A. Yes.

"Q. The King Sisters have made records, have they not?

"A. Yes.. They were formerly featured with Alvino Rey's band.

"Q. And they have been featured in theatres throughout the country, have they not?

"A. Yes.

"Q. And night clubs?

"A. Yes.

"Q. And they have great public acceptance, have they not?

"A. Yes, I would say so.

"Q. When did you next discuss the King Sisters with Mr. Finley? The King Sisters and Bonita Granville?? [372]

"A. Well, that too I don't remember exactly—when next. However, Mr. Finley went back to San Diego, and we telephoned him perhaps two or three times and discussed the possibilities of deals being consummated.

"Q. Do you remember the conversations that you had with Mr. Finley at that time?

"A. Not exactly the conversations.

"Q. Just the substance of the conversations.

"A. I do remember that it was agreed that Mr. Finley would buy the King Sisters.

"Mr. Ross: Now, wait. May I suggest that we get this thing in sequential order? I think these conversations, even though not as to exact date, should be fixed by some comparative means so that you know when, after this first conversation, we now get to the point where the

(Deposition of Kenneth Later)

witness is discussing what he in substance has said they agreed to.

“Q. Well, now, the first conversation that you had with Mr. Finley was at the M. C. A. office in Beverly Hills?

“A. Yes.

“Q. And thereafter you telephoned Mr. Finley in San Diego. Would you say that was a day or two after the first conversation?

“A. Yes. [373]

“Q. All right, now. What did you say to Mr. Finley and what did Mr. Finley say to you over the telephone at that time?

“A. I am in the same position: I just don't remember the exact conversation.

“Q. Just the substance of the conversation.

“A. However, I told him that the thing he was most interested in we could not make a deal for—that was Sinatra. I told him that there was a very good possibility of making a deal with Bonita Granville and the King Sisters. I think there were a couple of other people who were also available and who would have gone down and played it. But it was agreed that these few, besides the King Sisters and Bonita Granville, might be the best choice.

“Q. I see. Was a price quoted to Mr. Finley at that time?

“A. Yes. You mean for the King Sisters?

“Q. Yes, the King Sisters.

“A. Yes; I told him that I thought a deal could be made for fifteen hundred dollars.

(Deposition of Kenneth Later)

"For what period of time?

"A. I believe it was two days.

"Q. And do you remember the approximate date of their appearance in San Diego? [374]

"A. I think about the 10th of February.

"Q. Did Mr. Finley agree to hire the King Sisters at the fifteen hundred dollar rate?

"A. Yes, he did.

"Q. And did he tell you at that time to have contracts prepared and forwarded to him?

"A. Yes.

"Mr. Ross: Pardon me. When you say 'at that time', you are referring to the second conversation, which was a conversation had by telephone to Mr. Finley in San Diego?

"Mr. Desser: That is right.

"Mr. Ross: Is that the witness' recollection too?

"The Witness: Well, I don't honestly know either. I just know that I did talk to him and that he said he would confirm the booking, and to arrange for the booking of the King Sisters at the Mission Beach.

"Q. And for you to prepare the contracts and forward them to him; is that true?

"A. Yes; I would imagine so, yes.

"Q. Now, Mr. Later, did you thereafter communicate with the King Sisters?

"A. Yes; I talked to—I telephoned the King Sisters.

"Q. And which of the King Sisters is it that you talked to? [375]

"A. I don't remember which ones I talked to. I talked to two of them, as a matter of fact, one of them

(Deposition of Kenneth Later)

being away at the time. I think was Yonne that was away—I'm not sure.

"The Witness: (To Mr. Barnet) Which is the one that is married to Alvino Rey?

"Mr. Barnet: Louise.

"A. (Resuming) That's right—Louise. I called Louise's house, but she was away in Chicago at the time, so I talked to Yvonne and to one of the other sisters too.

"Q. And did you tell these two sisters that you had this possible booking with Larry Finley?

"A. Yes.

"Q. And did you tell them that the price was fifteen hundred dollars?

"A. Yes.

"Q. And did you tell them that their appearance would be required at the Mission Beach Ballroom at San Diego on or about February 10th?

"A. Yes.

"Q. For a two-day show?

"A. Yes, I did.

"Q. And what did they say?

"A. They agreed.

"Q. They agreed to accept the booking; is that right? [376]

"A. Yes.

"Mr. Ross: Just a moment. I move to strike out both the question and the answer. That is hearsay so far as any of the defendants in this case are concerned. I don't see how this witness can say anything concerning that—what he said or what was said with the King Sisters.

(Deposition of Kenneth Later)

"Mr. Desser: We have noted your objection, Mr. Ross.

"Q. Thereafter what, if anything, did you do in connection with this matter?

"A. Well, just about that time I was preparing to come to New York for a month's trip. I went in to see Larry Barnet—he was the head of the department and my actual superior—and I went in and told Mr. Barnet about it.

"Q. You are referring to the Mr. Barnet who is sitting in this room at this time, are you not?

"A. Yes.

"Q. All right, proceed, Mr. Later.

"A. I then turned all of the things which I had pending or in progress of negotiation over to Mr. Barnet to take care of while I was away.

"Q. You told Mr. Barnet that the King Sisters had confirmed the booking? [377]

"A. Yes.

"Q. You told him that Mr. Finley had agreed to accept the booking?

"A. Yes.

"Q. And you told him that Mr. Finley was waiting for the contract?

"A. Well, it was a confirmed booking; that would be a natural result of a confirmed booking.

"Q. Since you were going to New York, you asked Mr. Barnet to complete the arrangements; is that true?

"A. Yes.

"Q. Now, shortly thereafter you left for New York, did you not?

"A. I left on January 19th.

(Deposition of Kenneth Later)

"Q. And when did you return from New York?

"A. About three or three and a half weeks later.

"Q. When you returned from New York did you determine whether or not the King Sisters ever appeared at the Mission Beach Ballroom?

"Mr. Ross: I move to strike it; that's immaterial.

"Mr. Desser: Your objection is noted, Mr. Ross.

"A. I knew that they hadn't appeared at the Mission Beach Ballroom.

"Q. Had not?

"A. That's right. [378]

"Q. Do you know whether or not they appeared at the Pacific Square Ballroom in San Diego?

"A. Yes, I know that they did appear there.

"Q. Do you know that the Pacific Square Ballroom was at that time owned and operated by one Wayne Dailard?

"A. Yes.

"Q. Do you know approximately when they appeared at the Pacific Square Ballroom?

"A. I think about the 1st of February. I am not sure of that.

"Q. Do you know at what price they appeared at the Pacific Square Ballroom?

"A. No, I honestly don't.

"Q. Do you know how many days they appeared at the Pacific Square Ballroom?

"A. I think the booking was the same; I think they were all two-day bookings at the Pacific Square.

"Q. Mr. Later, in your work with Music Corporation of America, in charge of the acts and attractions

(Deposition of Kenneth Later)

department there for ten months, did Pacific Square ever book any acts or attractions during that period?

"Mr. Ross: Just a moment. I want to make an objection: I move that that is immaterial and has no bearing upon any point in issue in this case; whether or not they booked any other attractions would not be [379] relevant or pertinent to any of the issues in this case.

"Mr. Desser: Your objection is noted.

"(To the witness): You may answer the question.

"A. Well, they steadily booked bands as attractions; I don't recall them booking any acts.

"Q. I see. The King Sisters, of course, is an act; it is not a band attraction. Is that right?

"A. Yes.

"Q. To your knowledge, Pacific Square never booked an attraction similar to the King Sisters?

"A. Not during the time I was with M. C. A.

"Q. Either before you left for New York or after you returned from New York, did you have a conversation with anybody in the Music Corporation of America office concerning the booking of either bands or attractions in the Mission Beach Ballroom?

"A. Are you referring to M. C. A.?

"A. That's right, sir.

"Q. At M. C. A.?

"A. That's right, sir.

"Mr. Ross: I move to strike that question on the ground that it is completely incapable of an intelligent answer. He may have had conversations of any kind over a period of a year. [380]

(Deposition of Kenneth Later)

"Q. You understand the question, don't you, Mr. Later?

"A. Well, I understand you are asking whether I had any conversations with anyone at M. C. A. regarding the booking of bands or attractions for Mission Beach Ballroom after my return from New York.

"Q. Either before you left for New York or after you returned.

"A. Oh, yes, we had many conversations.

"Q. And with whom?

"A. Most particularly did I discuss this with Hal Howard, who was the one that originated the bookings or the idea of bookings for Mr. Finley.

"Q. What did he say concerning the booking of bands or attractions in the Mission Beach Ballroom?

"A. Well, he was the one who instigated the bookings of everything, as I understand it, with Mr. Finley, when he took over the operation of the Mission Beach Ballroom.

"Q. What I have particular reference to is whether or not M. C. A. would book any bands or attractions into the Mission Beach Ballroom.

"Mr. Ross: I move to strike that question as not being based on anything that was said or on any of the conversations that you are now interrogating the witness about. [381]

"Mr. Desser: The only question I am asking is whether or not any conversation took place. When he answers that question I may be—

"Mr. Ross: I don't know what conversation he can say took place that has the cause and effect of what you are asking him.

"Mr. Desser: Let the witness answer the question.

(Deposition of Kenneth Later)

"Mr. Ross: I make my objection.

"Mr. Desser: All right.

"A. I believe there were many conversations regarding the booking of bands and attractions at the Mission Beach Ballroom.

"Q. And you say those conversations were with Hal Howard?

"A. Well, I would say that there were several conversations with Larry Barnet.

"Q. Now, you can relate, in substance, the conversations with Larry Barnet concerning the booking of bands or attractions into the Mission Beach Ballroom?

"Mr. Ross: I would like to have the time and place fixed, and the person present.

"A. No, I cannot relate any conversations, although I feel that, since Larry was the head of the department, we would have discussed those things with him when they came up. I would say Hal Howard might have had conversations. [382] My conversations were actually with Hal Howard, whose office was with me down in the theatre: following each telephone conversation that he would have with Larry Finley, he would come and discuss the thing with me as regards the booking of attractions or something which would be salable to Mr. Finley.

"Q. Well, did Mr. Howard ever tell you that he had instructions that no attractions could be booked into Mission Beach?

"A. That no attractions could be booked there?

"Q. That no bands or attractions could be booked into Mission Beach?

"A. Well, certainly not attractions, since we were at that time negotiating regarding attractions.

(Deposition of Kenneth Later)

“Q. After you had returned from New York, was there something said about M. C. A.’s refusal to book into Mission Beach?

“A. Well, I can’t recall any conversation like that. I was really in a most uncomfortable position when I came back from New York, since I was leaving the agency, and it was a pretty unfriendly thing all round. I felt uncomfortable and the boys felt uncomfortable with me.

“Q. Well, now, before you left for New York, did Howard or anyone else in the M. C. A. organization tell you that Finley could not get any bands? [383]

“A. With name value?

“Q. Yes.

“A. Yes. Well, it was generally known among all of the boys at M. C. A. that Pacific Square was an old and valuable account”—

The Court: Just a moment. We will take our recess for a few minutes. Ladies and gentlemen, remember the admonition and keep its terms inviolate. Occupy the jury rooms.

(A short recess was taken.)

The Court: All present. Proceed. Finish with the deposition.

Mr. Jaffe: (Continuing reading):

“Q. Well, now, before you left for New York, did Howard or anyone else in the M. C. A. organization tell you that Finley could not get any bands?

“A. With name value?

“Q. Yes.

“A. Yes. Well, it was generally known among all of the boys at M. C. A. that Pacific Square was an old and valuable account at the Music Corporation and would

(Deposition of Kenneth Later)

certainly have gotten first call on any bands with any name value or box-office value.

“Q. Was that told to you by anyone directly?

“A. I would think it was probably told to me by several people, although I don’t remember an actual [384] conversation during which it was discussed.

“Mr. Desser: No further questions. You may cross-examine, Mr. Ross.

“Mr. Ross: I have no questions.

“Mr. Desser (to witness): That is all, Mr. Later, thank you.

(Whereupon, at 11:15 o’clock in the forenoon, the taking of the deposition of Kenneth Later was concluded.)”

Mr. Christensen: Thank you. You may step down, Mr. Jaffe. I offer it in evidence, your Honor.

The Clerk: That is Plaintiff’s Exhibit 5.

(The document referred to was marked as Plaintiff’s Exhibit No. 5, and was received in evidence.) [385]

Mr. Doherty: May I suggest that the jury be cautioned that where it referred to acts or omissions, that it is not an issue in the case.

The Court: Yes. Of course, I have already instructed the jury on that. Ladies and gentlemen, you will consider that instruction at each phase of the case where that same matter arises. This is a case that involves the question of bands. Proceed.

Mr. Christensen: Call Mr. Dailard, Wayne Dailard.

WAYNE DAILARD,

Called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Wayne Dailard.

Direct Examination

By Mr. Christensen:

Q. You are the Wayne Dailard we have been speaking of here, who formerly had the Mission Beach ballroom and the Pacific Square ballroom in the City of San Diego? A. Yes, sir.

Q. When did you first become the lessee of Mission Beach ballroom in the City of San Diego, sir?

A. It was late in 1939.

Q. At that time did you also acquire the entire Mission [386] Beach Amusement Center?

A. Yes, sir.

Q. And you continued to manage and operate the Mission Beach Amusement Center, including the ballroom, until January 3 of 1945? Is that true, sir?

A. January 1st or 3rd. I don't recall.

Q. Well, you had it New Year's Eve, didn't you?

A. Yes, that is correct.

Q. And you built the Pacific Square ballroom in the City of San Diego here a few years ago, did you not?

A. Yes, sir.

Q. Can you give me the date, sir?

A. I think we opened on December 28, 1940.

Q. And you had an agreement with Music Corporation of America concerning the furnishing to you of bands, did you not, sir? A. Yes, sir.

(Testimony of Wayne Dailard)

Q. You had the letter which was introduced here into evidence this morning, did you not?

A. Yes, sir.

Q. And thereafter, you had the formal agreement which was also introduced and read here in evidence this morning?

A. That is correct.

Q. At the time you had both the Pacific Square ballroom and the Mission Beach ballroom you played at both Music [387] Corporation of America bands, did you not, sir?

The Witness: Will you re-read that?

(Question read by the reporter.)

Mr. Doherty: May it be understood that, in the vernacular, Music Corporation bands are merely those that they act as employment agency for?

The Court: I think that is probably the case. Mr. Christensen, there is no question?

Mr. Christensen: The ones that were supplied to him by Music Corporation of America is what I had in mind, your Honor.

A. Yes, sir.

The Court: Supplied as agent?

Mr. Christensen: Yes, as agent. Yes, your Honor.

Q. And, as a matter of fact, in the year 1944—strike that. Let us start with the year 1945. The last band that you played at Mission Beach was Harry Owens, was it not, sir?

A. Yes.

Q. Commonly known as Harry Owens and his Royal Hawaiians, is that right?

A. I think that is correct.

Q. That was a band which was furnished to you by Music Corporation of America?

A. That is true.

(Testimony of Wayne Dailard)

Q. And the band that you had before that was Stan Kenton? [388]

A. That sounds right, but I would have to consult the records to confirm that definitely.

Q. And while you were playing Harry Owens at the Mission Beach ballroom you were also playing Charlie Barnett at the Pacific Square ballroom, were you not, sir?

A. I believe that is correct; yes.

Q. And immediately before Charlie Barnett at the Pacific Square ballroom you played Jan Garber?

A. I can't confirm those without records.

Q. Have you any records that would help you?

A. Not with me; no. That sounds approximately right.

Q. And immediately preceding that engagement, there was the engagement of Harry James?

A. I couldn't confirm it as definite. That sounds reasonable.

Q. All those that I have read so far are Music Corporation of America's bands, are they not, sir?

A. With the exception of Kenton, yes. Kenton was a General Amusement band.

Q. Kenton. Oh, well, yes. And you played Ted Fio Rito?

A. Yes.

Q. And he was a Music Corporation of America band?

A. That is right; yes.

Q. At the time of the opening of Mr. Finley of the Mission Beach ballroom you played against him there—or, [389] strike that. You played at the Pacific Square Vaughn Monroe, did you not?

A. That is correct.

Q. And at that time you also played or offered the King Sisters, an attraction?

A. That is correct.

(Testimony of Wayne Dailard)

Q. That is the first and only time that you ever played an attraction with an orchestra, is it not, sir?

A. No; that is not correct.

Q. Tell me when—

A. I can't give you dates, but we have played such attractions as the Andrews Sisters.

Q. Can you tell me when that was, sir?

A. Well, it was in the last three years. Booking a hundred attractions in a year, you can't call times and dates. That isn't reasonable. We played, I would say, at least ten major attractions.

Q. Give the best memory—

A. With major bands.

Q. Give me the best memory as to when and who you played those ten attractions?

A. It was during the past three years. I can give you that accurately. It is a matter of record. In a few days, or by tomorrow, I could give you that accurately.

Q. Will you do that? [390] A. Yes.

Q. Will you bring it to me tomorrow?

A. Yes. As a matter of fact, I think we played the Andrews Sisters three different times. We played attractions such as Sally Rand.

Q. You will bring that for me, will you, sir?

A. Yes.

Q. During the year 1945, at Pacific Square you played—I have already read to you Charles Barnett, I believe—Stan Kenton, Jan Garber, Charles Barnett, Ted Fio Rito, Vaughn Monroe. You followed that, did you not, by having two bands, Bob Chester and Jack Teagarden?

A. Yes. That is the common practice.

(Testimony of Wayne Dailard)

Q. Did you ever at any time besides that time ever have two bands? A. Yes.

Q. Tell me when, sir?

A. I can't give you the date.

Q. At your ballroom at Pacific Square?

A. Yes.

Q. Do you have a record of that, sir? A. Yes.

Q. Both Bob Chester and Jack Teagarden are M. C. A. bands, are they? A. That is correct. [391]

Q. Then you followed that, did you not, with Ted Lewis?

A. I can't give you the accurate dates. That sounds right.

Q. And he, too, was a Music Corporation of America band? A. Yes.

Q. You followed that by Jean Cooper, did you not?

A. He should have come in there; yes.

Q. He, too, was a Music Corporation of America band? A. That is correct.

Q. And you again had Jack Teagarden, did you not?

A. Well, I don't know. I can bring those records, if you want to wait for them, and give it to you accurately. Our booking sheets are open, our procedure is.

Q. I think that might be better, sir. You have handed me a memorandum on the—well, it is entitled "Memorandum to Pacht, Pelton, Warne, Ross & Bernhard"?

A. Well, that has no significance, that heading. I simply jotted those figures down.

Mr. Warne: It will be stipulated that Pacht, Pelton, Warne, Ross & Bernhardt has no part in this at all?

Mr. Christensen: I just stated it was on this memorandum, sir. I know nothing more about it than that, sir.

(Testimony of Wayne Dailard)

Q. And you show that a profit derived from the operation of Mission Beach for the year 1944 was \$79,924.53—correct, [392] sir?

A. That is correct, sir.

Q. And for the year 1943—

Mr. Doherty: May I reserve our usual objection, on the ground, your Honor, this is incompetent, irrelevant and immaterial, hearsay, not within the issues of the case? That is not a proper basis for comparison; and that you cannot use this gentleman's operation as the basis for what Mr. Finley might or might not have made.

The Court: Overrule the objection.

Q. By Mr. Christensen: And for the year 1943, at Mission Beach, the profit was \$72,759.66, sir?

A. That is correct.

Q. And for the year 1942, say, about \$50,000?

A. That is about correct.

Q. Now then, for the same period of time at Pacific Square, starting in reverse order this time with the year 1942, the profit—

Mr. Doherty: The same objection, your Honor, as to the testimony on Pacific Square; the same objection that I have heretofore made.

The Court: The same ruling.

Q. By Mr. Christensen: To continue with the question—\$53,608.88, sir? A. That is correct. [393]

Q. For 1943, \$123,300.09, sir?

A. That is correct.

Q. And for 1944, \$169,582.28?

A. That is correct.

(Testimony of Wayne Dailard)

Q. You sold the Mission Beach—I misspoke myself. You sold Pacific Square, did you, in 1945, sir?

A. Yes; July 1st.

Q. So that, for the six months of 1945 it was approximately \$30,000, sir? A. Yes.

Q. To whom did you sell?

A. To Mr. Walter Stutz.

Q. Mr. Walter Stutz prior to that time, that is to say, prior to buying Pacific Square, had the liquor concession in the Pacific Square ballroom?

A. That is right.

Q. You knew, of course, that the City Council would advertise for bids for the leasing of the Mission Beach ballroom for a period of three years beginning on or about the 1st day of January of 1945, did you not, sir?

A. Yes.

Q. And you did make a bid there?

A. That is correct.

Q. Mr. Dailard, I will ask you to examine this photostat and tell me if you signed and submitted to the City [394] Council of the City of San Diego the original thereof, sir? A. Yes; this looks correct.

Q. And that is a photostatic copy of your signature, is it, sir? A. Yes.

Q. And the signature there of Edmund A. Wakelin?

A. Is my partner.

Q. You recognize that as his signature?

A. Yes, sir.

Mr. Christensen: I offer this as our exhibit.

Mr. Doherty: Just a moment, your Honor. That is the same document your Honor ruled on on Tuesday, subject to our objection, that is, ruled on our objection;

(Testimony of Wayne Dailard)

and, stating our objections, as incompetent, irrelevant and immaterial, hearsay as to the defendants in this case, not within the issues.

The Court: Are you renewing your objection now? Do you mean that you are renewing your objection now, Major?

Mr. Doherty: Yes, your Honor.

The Court: The objection is overruled.

The Clerk: Plaintiff's Exhibit 6.

(The document referred to was marked as Plaintiff's Exhibit 6, and was received in evidence.)

The Court: You had better show that bid to the jury. They do not know what is in it. Read it now or at a later [395] time.

Mr. Christensen: Well, I think that this might be a good time to read it.

The Court: As I understand it, the objection does not go to the authenticity of the photostat?

Mr. Doherty: It does not go to that ground, your Honor. I might say the further ground, that there is no foundation laid; there is no showing of a combination; that there is no offer to connect it up; that any statements that Mr. Daillard made were voluntary on his part and not binding on any of these defendants. And I am not raising any question on the foundation that it is not the original document.

The Court: Overruled.

Mr. Christensen: May I have Mr. Jaffe read it? I have not recovered from my cold.

(Testimony of Wayne Dailard)

The Court: You had better have one of the other gentlemen use their voice.

Mr. Jaffe: I do not mind.

The Court: All right.

Mr. Jaffe: (Reading Plaintiff's Exhibit 6 in the following words and figures):

"October 30, 1944

"To the Honorable Mayor and the Members
of the City Council of San Diego

"Gentlemen: [396]

"Under lease from the City of San Diego we have operated the Mission Beach Amusement Center for the past five years. It is our desire to continue to operate the Mission Beach Amusement Center and, therefore, we respectfully submit the following bid for a lease.

"We make this bid subject to the 'Notice to Bidders', as published in San Diego newspapers, and also subject to the further terms and conditions filed in the office of the City Clerk under Document No. 350454.

"Accompanying this bid and made a part of it is our certified check in the sum of \$1,000.00, payable to the Treasurer of the City of San Diego. This check is handed you as a guarantee that we will execute the contract if it is awarded to us. We also hand you with this bid a statement executed by the Commercial Casualty Insurance Company of Newark, New Jersey, to the effect that said company upon our request will issue the bond required under the terms of the lease.

"If a lease is awarded to us for a period of three years commencing January 1, 1945, we will pay to the City

(Plaintiff's Exhibit 6)

of San Diego, as rental \$20,000.00 per year, plus five per centum of the gross receipts derived from the operation of said Amusement Center. [397]

"If the lease is awarded to us, we agree that we will operate the Mission Beach Amusement Center in the following manner:

"1. We will not operate or permit the operation by any other person of any concession or facility therein located in violation of any Federal, State or Municipal law.

"2. We will maintain and operate the picnic area and the play area lying westerly of the parking lot. We will make no charge for the use of the picnic facilities. In connection with various games which may be played in the play area, as soon as we can determine which games are most suitable, popular and available we will submit the charges to be made for the use of play articles to be furnished by us, such as horse shoes, nets, balls, etc., to the City Manager for his approval, and we will not make any charge which does not meet with the approval of the City Manager or such other City official or officials as you may designate.

"3. (a) We propose to operate a minimum of ten facilities and devices for amusement, and more if available, which may be classified under the general character of 'rides', such as merry-go-round, Ferris wheel, tilt-wheel, caterpillar, scooter, rocket, roll-o-plane, etc. The price to be charged to the public [398] for the use of these amusement devices will be fifteen cents plus tax.

"(b) We propose to reduce the present twenty-four to seventeen facilities and devices for amusement which

(Plaintiff's Exhibit 6)

may be classified under the general character of 'amusement Skill games', such as milk bottle games, dart games, cat racks, basket ball, shooting galleries, etc. The present charge made for these games is twenty-five cents, however we propose to reduce the present charge so that of the approximate seventeen such games the charge will be ten cents for four of such games, fifteen cents for seven of such games, and twenty-five cents for six of such games.

"(c) We propose to operate a minimum of five facilities and devices for amusement which may be classified under the general character of 'miscellaneous', such as fun house at a charge to the public of fifteen cents, glass house at a charge to the public of fifteen cents, photo studios at charges to the public from twenty-five to fifty cents, penny arcade, etc.

"(d) We propose to operate approximately ten restaurant and variety food dispensing stands and two wine and beer establishments. In connection with [399] the price to be charged in the restaurants and the wine and beer establishments, prices in excess of the maximum OPA ceilings will not be charged. In connection with food and drinks generally sold, we agree to abide by the OPA ceiling prices, and it is proposed to charge fifteen cents for hot dogs and hamburgers, ten cents for ice cream, ten cents for popcorn, ten cents for soft drinks, and five cents for coffee.

"4. During the season we intend to offer to the public each year ten major free or promotional events or facilities, such as All States Day, Texas Day, Bathing Beauty Review, Under-Privileged Children's Day, Water Carnival, Labor Day Celebration, Fourth of July, Me-

(Plaintiff's Exhibit 6)

morial Day. When these events occur we will offer such free attractions as may be available and conditions will permit.

"5. During the season from May 15 to September 15, inclusive, of each year we will operate the dance hall a minimum of three nights a week. We propose to operate the dance hall after the season for as many additional weeks as weather and other conditions will permit. The Music Corporation of America controls the booking of ninety-five percent of all Name Bands in this country. We have an agreement with the Music [400] Corporation of America granting to us the exclusive rights of presentation in San Diego County of attractions controlled by said corporation. We believe that we are the only persons who are in a position to furnish San Diego with a continuous flow of Name Bands, and it is our intention, subject always, of course, to condition beyond our control, to place Name Bands at Mission Beach. When the dance hall is not operated by us it will be available to the public for lease at \$125.00 per night.

"In connection with our qualifications, experience and financial standing, we desire to offer as a part of this bid letters signed by each of us, dated October 28, 1944, setting forth our qualifications and experience, and attached to said letters is a financial statement showing our assets and liabilities as of October 28, 1944.

"Further, in connection with our qualifications and experience, we wish to state that we have a present existing staff of competent trained amusement operators. We are maintaining an office in San Diego. We are an existing going business, operating the Mission Beach Amuse-

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(Plaintiff's Exhibit 6)

ment Center and we can continue with our operation of that enterprise and in the manner herein stated without the necessity of a [401] reorganization or the organization of a new operating company. In connection with our present operation of the Mission Beach Amusement Center we have equipment which we value at \$6,900.00, which equipment is necessary and is now in use.

"We trust that we have incorporated in this bid all of the information you require. Our representatives are willing to cooperate fully with you at any time and to furnish you with whatever additional information you may desire.

"Respectfully submitted,

"(Signed) Wayne W. Dailard

"(Signed) Edmund A. Wakelin"

Attached thereto is a letter on the Pacific Square, Ltd. stationery, San Diego, California, dated 28 October 1944.

"The Honorable Council of the City of San Diego

"Civic Center

"San Diego, California

"Gentlemen:

"You will find attached herewith financial statement as of today's date in accordance with the provision outlined in Paragraph 17, page 5 of the Specification for Bids on Lease of the Mission Beach Amusement Center.

[402]

(Plaintiff's Exhibit 6)

"With respect to qualifications and experience referred to in the same paragraph, my personal background including the following:

"Six years as Division Manager for the Radio Keith Orpheum Corporation, 1560 Broadway, New York City.

"Seven years as Western General Manager for the same company with headquarters in St. Louis and Chicago. During this period I directed the entire operation of 226 theatres located in major cities.

"One year director of Electric Park, Kansas City, Missouri.

"One year director of Krug Park, Omaha, Nebraska.

"Three years District Manager for the Fox West Coast Theatres, headquarters Los Angeles, and San Diego.

"Manager of the San Diego Exposition in 1936.

"For the past five years have conducted my own business, which includes the direction of Mission Beach Amusement Center and Pacific Square, Ltd.

"Other affiliations include Member of the Board of Governors, St. Louis Municipal Opera; Board of Governors of the New Orleans Mardi Gras; member of the Veiled Prophet Association, St. Louis, and past member of the Theatre Guild. [403]

"Very truly yours,

"(Signed) Wayne W. Dailard"

(Plaintiff's Exhibit 6)

"Financial Statement
"As of 28 October 1944

"Assets

Cash in Bank of America	\$48,386.20
Securities	3,750.00
Book value of interest in Pacific Square, Ltd.	118,420.26
Book value of El Cajon Valley Ranch	28,639.26
Book value of personal property	19,973.54
Book value of interest in Beach Amusement Enterprises equipment	3,450.00
Total Assets	\$222,619.26

"Liabilities

Accrued balance of Federal Income Taxes to date, payable December 31, 1944	\$ 7,572.98
Total liabilities	\$ 7,572.98
Net Worth	\$215,046.28"

Letter dated 28 October 1944.

"The Honorable Council of the City of San Diego

"Civic Center

"San Diego, California

"Gentlemen: [404]

"You will find attached herewith financial statement as of today's date, in accordance with the provision outlined in Paragraph 17, Page 5 of the Specification for Bids on Lease of Mission Beach Amusement Center. ' ' ' "

(Plaintiff's Exhibit 6)

"With respect to qualifications and experience referred to in the same paragraph, my personal background includes the following:

"3½ years affiliated with Pantages Theatres Circuit.

"2 years with West Coast Theatres Circuit.

"2 years as concession director of the San Diego Exposition.

"For the past five years have conducted my own business which is the management of Mission Beach Amusement Center.

"Very truly yours,

"(Signed) Edmund A. Wakelin"

"Financial Statement

"As of 28 October 1944

"Assets

Real Estate—4 Unit Court

822 Brighton Court, Mission Beach	\$20,000.00
Securities	6,000.00
Personal Property	8,000.00

[405]

Cash in Bank of America	\$ 38,650.00
Accounts Receivable	2,000.00
Book Value of interest in Beach	
Amusement Enterprises equipment	3,450.00
Total Assets	\$ 78,100.00

"Liabilities

Mortgage on above Real Estate	\$ 6,800.00
"Net Worth	\$ 71,300.00"

(Plaintiff's Exhibit 6)

I Hereby Certify that the above and foregoing is a full, true and correct copy of contents of Document No. 350633, filed in the office of the City Clerk, San Diego, California, on October 31, 1944.

"Fred W. Sick, City Clerk,

"By (Signed) Clark M. Foote, Jr., Deputy."

Q. By Mr. Christensen: Now, Mr. Dailard, you advertised in The Tribune-Sun, a paper of general circulation in the City of San Diego, on Monday, May 14, 1945, on Tuesday, May 15, 1945, and on Wednesday, May 16, 1945, your Pacific Square ballroom, did you not, sir?

A. Yes; that is correct.

Q. I show you the advertising and ask you to identify it. They are in reverse order from what I have just read them to you, Mr. Dailard.

A. Yes, that is our ad.

Q. There are three of them, sir. I wish you would look [406] at all three of them.

A. That is ours; yes, sir.

Mr. Christensen: I offer these three ads as our exhibits next in order, your Honor.

Mr. Doherty: Object to them on the ground that they are hearsay, incompetent, irrelevant and immaterial, outside of the issues of the case; they are volunteer statements by a person not a party to this action and at a date subsequent to the commencement of the action.

Mr. Christensen: I only say that he is named in the action.

The Court: The objection is overruled.

This line of evidence, ladies and gentlemen, is to be considered by you not as proof of the facts stated in the advertisements, but the fact of the advertisements.

(Testimony of Wayne Dailard)

There are certain representations made there and certain statements which are material in this case, which will have to be connected up with the defendants in this case. The witness on the stand is not a defendant in the case. He is alleged to be what the pleadings call a co-conspirator, but before the unlawful agreement can be considered as applicable to those whom it is alleged constitute the unlawful enterprise, there must be a connection shown which justifies either the inference by you or the finding by you from direct testimony that there is such an agreement. [407]

Mr. Doherty: Your Honor, may I suggest or request that the same admonition be given to the jury respecting the document that has just been read? It is not only signed by Mr. Dailard, but signed by a party who is certainly not a party to the action, a Mr. Wakelin.

The Court: Of Course, the exhibit—what is the number of that, Mr. Clerk?

Mr. Warne: Six, your Honor.

The Clerk: Six.

The Court: —Exhibit 6 falls in a little different category from the advertisements that have just been received in evidence. But before Exhibit 6 or any other exhibit can be tied into the defendants in the case, there must be sufficient evidence which justifies either an inference by you that there was a partnership or an unlawful combination and agreement, or what in law is called a conspiracy. I am using that term because it is a legal phrase, not because of any other feature or connotation that may be implied by the use of it.

The other name, there has been no explanation at this time as to the other name that is on Exhibit 6. You are

(Testimony of Wayne Dailard)

not to infer anything by reason of the fact that there is another name on it.

Proceed.

The Clerk: For the record, that newspaper is Plaintiff's [408] Exhibit No. 7.

The Court: There were three of them, I believe, clipped together.

The Clerk: Use them as one exhibit?

Mr. Christensen: That is agreeable, your Honor. They are clipped together.

The Court: Put them all together.

(The documents referred to were marked as Plaintiff's Exhibit No. 7 and were received in evidence.)

Q. By Mr. Christensen: Mr. Wakelin, whose name appears on that bid, at that time was a partner with you, was he not, sir? A. In Mission Beach.

Q. Yes, sir.

A. He was a member of the general partnership.

Mr. Christensen: That is right. Ladies and gentlemen, I desire only to invite your attention to the ad which has just been received in evidence. The three are identical. Let me read it. The ad reads as follows:

"Do not be confused Pacific Square will continue to present 90% of all name bands. Coming during ensuing weeks:"—

and I will have to read this carefully—

"Harry James, Les Brown, Gene Krupa, Sammy Kaye, Tommy Tucker, Harry Owens, Artie Shaw, Guy Lombardo, [409] Xavier Cugat, Freddie Martin, Vaughn Monroe, Charlie Spivak, Henry Busse, Jan Savitt, Ted Weems, Louis Prima, Ted Lewis, Eddie Duchin, Freddie

(Testimony of Wayne Dailard)

Slack, Hal McIntyre, Benny Goodman, Wayne King, Abe Lyman, Joe Saunders, Charlie Barnet, Henry King, Joe Reichman, and many others."

The ad continues:

"Dancing 9:00 to 1:00, Friday, Saturday, Sunday, held over 2nd big week, Jan Garber and his orchestra, Music Corp. of America Bands, Pacific Square, Direction, Wayne Dailard, every Tuesday old-time dance."

The ad appearing under Tuesday, May the 15th, is the same except down as we get below:

"Tuesday Merl Lindsay and his orchestra. Friday, Saturday, Sunday, Jan Garber and his orchestra held over. Music Corporation of America Bands, Pacific Square, Direction Wayne Dailard."

And the ad of Monday, May 14th, 1945, again:

"Do not be confused Pacific Square will continue to present 90% of all name bands. Coming during ensuing weeks,"

and the list is the same.

"Dancing 9:00 to 1:00." [410]

This ad is the same as the ad that I just read to you.

Q. Mr. Dailard, during the time that you operated Mission Beach during the year 1944 how many nights a week did you conduct dancing there, sir?

A. I think, during the summer period we operated three nights a week.

Q. The summer period was what time, sir?

A. From about May 30th to Labor Day.

Q. And did you operate three nights every week during that time?

(Testimony of Wayne Dailard)

A. I don't know without consulting records. I believe we did. In 1944, I am sure we did.

Q. And then, let us take the period from January 1st to May.

A. I think it was just miscellaneous engagements, just occasional engagements.

Q. And from Labor Day until the end of the year, sir?

A. Probably the same application.

Q. Was that true also during the year 1943?

A. Substantially so; yes, sir.

Q. And during the year 1942?

A. I would have to consult records.

Mr. Christensen: With the exception that this witness has agreed to bring to us tomorrow a list of the bands which played there, I have no further questions. [411]

The Court: Do you want to defer your cross examination, Major, until the morning, or do you want to proceed now with what cross examination you have?

Mr. Doherty: I was going to suggest it probably would be better if counsel had another short witness that he could now interpose, then we would not have Mr. Dailard under cross examination and then under direct and back and forth. It would be more orderly the other way.

The Court: I think it would be. Haven't you someone that you can fill in the 15 or 20 minutes with?

Mr. Christensen: May I have the privilege at this time of having read Mr. Finley's bid to the City Council which is already, I believe, in evidence?

The Court: Yes. You may leave the stand, Mr. Dailard, and return in the morning.

The Witness: Thank you. [412]

(Testimony of Wayne Dailard)

The Court: Was it marked for identification, Mr. Figg? Is that the Plaintiff's exhibit?

Mr. Warne: May I suggest, your Honor, that this occurred, that we requested at the pre-trial hearing the admission that that was the certain document.

Mr. Christensen: May I offer it at this time and have it read rather than call another witness now? I haven't time to call a witness.

Mr. Doherty: And it will be agreed that Mr. Finley has taken the stand and identified this as his bid, and that he may be examined upon it when he takes the stand?

Mr. Christensen: Yes, your Honor.

Mr. Warne: If the court please, there is one question. I don't believe that the document just presented, as a matter of fact, I know for a fact that this is not the whole of the bid submitted by Mr. Finley, and I submit a foundation be laid on that.

Mr. Christensen: I have the rest of the documents here. I have all of them for you.

The Court: We had one here at the pre-trial. I was under the impression that it was identified in the trial before the jury, but probably not.

Mr. Doherty: It is understood, of course, that in the offer of this agreement it is subject to our objection that it is hearsay, not within the issues of the case, no [413] foundation laid showing any connection between it and the defendants, and no offer or promise to connect it up with any alleged conspiracy or combination. I presume that would cover it.

The Court: This doesn't interest you, ladies and gentlemen, so that you don't need to be worried about it. It

(Testimony of Wayne Dailard)

is for the judge. Objection overruled. The same ruling that has been made.

From now on it is for the jury.

Mr. Christensen: Will you mark this, please?

The Clerk: Is this for identification?

The Court: No, it is in evidence.

The Clerk: Plaintiff's Exhibit No. 8.

(The document referred to was marked as Plaintiff's Exhibit No. 8, and was received in evidence.)

The Court: Do you have it all together now? Is it all there now, gentlemen?

Mr. Christensen: Yes.

The Court: Mr. Warne, it is now all intact, the entire bid?

Mr. Warne: Very well.

The Court: Counsel states it is.

Mr. Warne: We haven't had an opportunity to examine it, so I do not know.

(The document referred to was handed to counsel.)
[414]

The Court: It is now about twenty minutes after four. I think you had better look that over between now and tomorrow morning, and we will excuse the jury at this time and give them a little vacation.

Ladies and gentlemen, we will take a recess until 10:00 o'clock tomorrow morning. Remember the admonition and keep its terms inviolate, and be here in the morning at 10:00 o'clock.

(Whereupon, at 4:20 o'clock p. m. January 31, 1946, an adjournment was taken until 10:00 o'clock a. m., Friday February 1, 1946.) [415]

Los Angeles, California, Friday, February 1, 1946,
10:00 a. m.

The Court: All present. Proceed.

Mr. Christensen: Mr. Dailard, is he here?

WAYNE DAILARD,

called as a witness by and on behalf of the plaintiff,
having been previously duly sworn, resumed the stand
and testified further as follows:

Direct Examination (Resumed)

By Mr. Christensen:

Q. Mr. Dailard, yesterday before you left, I guess
you observed I was using a list, and I loaned it to you
to check? A. That is correct.

Q. You have made a check of this list which I loaned
to you, which I now hold in my hand? A. Yes, sir.

Q. Did you not, sir? A. Yes, sir.

Q. And the list, you have told me here a moment ago,
was correct as far as your memory serves you?

A. Yes.

Mr. Christensen: May I offer this list of bands which
have appeared at both Pacific Square and Mission Beach
now into evidence?

Mr. Doherty: May I look at it quickly, your Honor,
[417] because I have not seen it?

Mr. Christensen: I have a copy, Mr. Doherty, if you
would like, that you may use for a moment.

Mr. Doherty: Whose are the lead pencil memo-
randums?

The Witness: Those are mine.

Mr. Christensen: Suppose we ask Mr. Dailard.

(Testimony of Wayne Dailard)

Q. You say that those are yours A. Yes.

Mr. Christensen: Thank you, sir.

Mr. Doherty: I haven't had a chance to look at it, your Honor. I assume it is something that has been checked by the witness.

Mr. Christensen: Mr. Dailard has just advised us that he has checked this.

The Witness: It is substantially correct.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit No. 9.

Mr. Doherty: Subject to our general objection heretofore made, your Honor.

The Court: So ordered. And if it is found to be inaccurate, subject to be rechecked.

The Witness: Yes, sir.

The Court: Did you hear me, Major? If found to be inaccurate, subject to rechecking?

Mr. Doherty: Yes, sir, your Honor. [418]

The Court: If you both agree that it does not contain accurately the matter that it purports to contain.

Mr. Christensen: Yes, sir, your Honor, of course.

The Court: Very well. Cross-examine.

(The document referred to was marked as Plaintiff's Exhibit No. 9, and was received in evidence.)

Mr. Christensen: I would like to ask just a couple more questions, sir.

Q. During the year 1945, all of the bands, all of the name bands submitted to you by Music Corporation of America were used by you in Pacific Square, were they not sir?

(Testimony of Wayne Dailard)

A. That would have to be checked. I can't answer that.

Q. Can you recall any?

A. I don't recall any that were submitted that were not booked, but it often happens that—

Mr. Christensen: I have some photographs which I have heretofore submitted to counsel.

Q. Mr. Dailard, I show you here certain photographs, taking them in order, and ask you if you recognize the photographs? A. Yes.

Q. That is a photograph of Pacific Square ballroom, is it not? A. It is not very complimentary. Yes. [419]

Q. And this also is a photograph of the Pacific Square ballroom, sir? A. Yes.

Q. This also is a photograph of the Pacific Square ballroom, is it not, sir? A. Yes, sir.

Q. And this is a photograph of one of the scenes in Pacific Square ballroom? A. Yes, sir.

Mr. Christensen: May these be received into evidence as our exhibit, collectively, next in order, sir, your Honor?

The Court: Any objection to these, gentlemen, these photographs?

Mr. Doherty: Subject to the objection—I say, the general objection, hearsay, incompetent and irrelevant, not within the issues of the case, and no showing of a combination or any promise to connect up with any conspiracy or combination.

The Court: Objection overruled.

(Testimony of Wayne Dailard)

I wanted to ask you a question about the first one of these series in exhibit—what?

The Clerk: Plaintiff's Exhibit No. 10.

(The documents referred to were marked as Plaintiff's Exhibit No. 10, and were received in evidence.) [420]

The Court: There are four of them in this exhibit. This large building back of the telegraph pole, what is that? A. That is the Civic Center.

The Court: What is the building?

The Witness: I beg pardon, sir?

The Court: What is the large building?

The Witness: Civic Center.

The Court: The City Hall of the City of San Diego, isn't it?

The Witness: That is correct.

The Court: Show them to the jury if you want to. [421]

Q. By Mr. Christensen: I have one more question, Mr. Dailard. I asked you yesterday to check to determine if you had used any attraction, as distinguished from a band or orchestra, at any time prior to February 2, of 1945? A. Yes, sir.

Q. Will you tell me when that was, and what it was?

A. May I consult notes?

The Court: Yes, sir. And keep your voice up, please.

The Witness: Mr. Christensen, I haven't the exact play dates because the contracts on attractions are on file in San Diego,—

Q. By Mr. Christensen: Yes, sir.

A. —but I can give you the years, and I can give you the place they appeared.

(Testimony of Wayne Dailard)

Q. Yes, sir.

A. In 1945 on February 1, 2 and 3 at Pacific Square we had the King Sisters.

Q. May I interrupt you there? That was the date that Mr. Finley opened at Mission Beach?

A. I don't know. On March 9, 10 and 11, 1945 we played Abbott and Costello at Pacific Square.

Q. And through whom were those booked?

A. The arrangements were made, I think, through Music Corporation. They were booked direct with Abbott and Costello's agent, as I remember, but I think the transaction was made [422] through Music Corporation.

Q. Well, can you tell me if there were any attractions prior to the time that Mr. Finley opened, say, February 3rd?

A. Let me finish, and I will give it to you. I have it all here. In 1943 at Pacific Square we presented Sally Rand.

Q. Can you tell me approximately when that was, sir?

A. Not without getting the original contract. In 1943 at Pacific Square we presented the Andrew Sisters on two separate occasions. I can't give you both dates. I have one accurately, October 22, 23 and 24. It was a repeat appearance.

Q. That was during the year 1943?

A. Yes. You won't find it on your list because those contracts were issued from different agencies. We have the copies of the original contracts in San Diego in our file.

(Testimony of Wayne Dailard)

Q. Yes, sir.

A. In 1942 and in 1943 at Pacific Square we presented, "Six Hits and a Miss."

In 1942 or 1943 we presented the Merrimacs.

In 1942 at Pacific Square we presented Liz Tilton as an added attraction.

In 1941 at Mission Beach we presented Dick Powell.

In 1942 at Mission Beach we presented Faith Bacon. In 1941 at Mission Beach we presented the Andrews Sisters.

In 1943, sometime I think during the month of April, at [423] Pacific Square we presented the Pied Pipers, and in 1942 or 1943 we presented Harriet Hilliard.

Q. Tell me—

A. Now, we are able to substantiate this as to accuracy when we obtain our files, if it is necessary. If you require that, we will have to dig them out.

Q. If that is your best memory, Mr. Dailard, I wouldn't ask you to do any more.

A. Thank you, sir.

Q. You have made an effort to determine this for me.

A. Thank you, sir.

Q. Harriet Hilliard, who is that or what is she?

A. She was a singer appearing with Ozzie Nelson's band. As a matter of fact, she is his wife. She appeared with him for some time, and later became an attraction for herself, and it became necessary to book her separately. Inasmuch as they appeared jointly over the radio, we thought it was good business to keep the team together and booked her as a special attraction.

The Court: Ozzie Nelson was the leader?

(Testimony of Wayne Dailard)

The Witness: Yes, but she had her individual act.

The Court: They have their individual program now?

The Witness: That is correct, I believe.

Q. By Mr. Christensen: At the time you had booked Ozzie Nelson's orchestra, and you had her as an added [424] attraction?

A. I don't know that that is the case. I know it was the case in one instance, but I have a hazy recollection of having booked her with one other band.

Q. Now, one other I remember you mentioning is Faith Bacon. Is that correct, sir? A. Yes.

Q. Tell me, what is she?

A. Faith Bacon is a dancer, at one time nationally renowned, but a little bit antiquated at the moment.

Q. Now, what are the others? Refer to your list, or if you will pardon me and let me have this, maybe you can help me. There are some of them that I remember. The King Sisters, that is an attraction which is a part of and appears with the Alvino Rey orchestra; that is correct?

A. It did appear. I understand since they have outgrown the band stage and have become an attraction.

Q. Miss Sally Rand, I think we needn't ask you about that. The Andrews Sisters, that is a singing act; is that correct? A. That is correct.

Q. "Six Hits and a Miss," is that also a singing act?

A. Yes, it was a big radio attraction, and we booked it.

Q. And the Merrimacs? [425]

A. That likewise was a five-people singing act.

(Testimony of Wayne Dailard)

Q. Now, Tiz Tilton? A. Liz Tilton.

Q. I am sorry. I thought that was a "T". Please tell me what she is.

A. She is a singer, a radio personality.

Q. Now, Dick Powell in 1941 had an orchestra, didn't he? A. No, he didn't.

Q. He appeared separately?

A. He appeared as an act.

Q. And the Pied Pipers seem to be the other one on here, and that is a singing act? Am I correct, sir?

A. A singing act.

Mr. Christensen: Thank you for helping us. That is all, Mr. Doherty.

Mr. Doherty: Your Honor, may I induce Mr. Dailard to raise his voice by examining him from back there?

The Court: I asked him to raise his voice. Make a little effort, please. It is hard to hear you.

Cross-Examination

By Mr. Doherty:

Q. Mr. Dailard, now speak so I can hear you, and I have a head cold. How many times, in addition to February 2nd and 3rd, I believe the dates were, 1945, how many other [426] times did you book the King Sisters? A. Read that back to me.

(The question was read.)

A. I think on two different occasions.

Q. The last exhibit shown to you was Exhibit 10, which was photographs of Pacific Square?

A. That is correct.

(Testimony of Wayne Dailard)

Q. You saw those, did you? A. Yes, sir.

Q. From what angles were those photographs taken?

A. Very uncomplimentary.

Q. What part of the building?

Mr. Christensen: I object and ask that the answer be stricken as a conclusion and opinion of the witness, and not responsive to the question.

The Court: Probably the adjective term is objectionable. Can you describe where the camera was set from that picture?

The Witness: The camera apparently was placed at some tracks that run immediately behind our building. I may, however, describe the situation, that this building is placed within a stone's throw of San Diego's finest building, which is the Civic Center, and on the main arterial highway leading into town.

Q. By Mr. Doherty: How far is this building located from the Civic Center? [427] A. One block.

Q. You testified yesterday that on July 1st you had sold this property to Mr. Stutz?

A. That is correct, sir.

Q. And what was the sales price?

A. Three hundred thousand.

Q. \$300,000.00? A. That is correct, net.

Q. And what were the terms of sale? A. Cash.

Q. Was it all cash?

A. It was cash at the time of the transaction. We later put back one hundred thousand first trust deed as an investment.

Q. That is \$200,000.00 was paid to you in cash net?

A. That is correct.

(Testimony of Wayne Dailard)

Q. And one hundred thousand first trust deed?

A. Which was at our request. The deal was predicated on a cash basis.

Q. You have had no interest in that property since July 1st last? A. No, sir.

Q. Mr. Dailard, what experience have you had in the entertainment world prior to your activities at Mission Beach and Pacific Square? [428]

A. I have spent twenty-six years in the business. I was affiliated with the Orpheum circuit for a number of years. I was affiliated with the Fox-West Coast chain for two years. I built, or operated and assisted in building the World's Fair. I was managing director of the Fair from the middle of 1935 through the liquidation period, and since that time I have operated my own business. That was in 1936.

Q. Which fair are you referring to?

A. The San Diego Fair.

Q. How did you come to be named director of that, if you know?

A. I was approached by a group—I was approached by the board of directors of the Exposition Corporation, which was comprised of 126 of San Diego's outstanding business people, who asked me to take over their situation, take over the management and direction of the Fair. This had happened after the Fair had opened, and they had got a little bad start. I was at the time under a contract to Fox Theatres, and I think Mr. Emil Klicka, vice-president of the Bank of America, Mr. Raymond Wansley, and other gentlemen of San Diego approached my superiors and asked for a loan of

(Testimony of Wayne Dailard)

me for the period of the Fair, which was granted by the officials of the Fox Theatres. As I stated, it was through the entire period of the Fair, and the demolition and liquidation of the Fair Corporation. [429]

Q. What was the investment in that Fair property and the activities there?

A. We turned over—this is an estimate as accurate as possible to arrive at—we turned over in the neighborhood of fifteen to twenty-two million dollars. That was in building and the entire net intake and outlay of the corporation and of the concessionaires connected with the corporation.

Q. And you were the general manager and director of it under the direction of the Board of Directors?

A. Yes.

Q. Now, as to the outcome, the financial outcome of the Fair, was it a success or was it in the red?

A. We operated—we had the distinction, I should say, of operating the one of two successful fairs in a hundred years, that is, on a large scale, the Century of Progress, I am told, was—

Mr. Christensen: Well, just a moment. May this be stricken as a conclusion or opinion, and based upon hearsay?

Mr. Doherty: I concede that it go out, your Honor, the Century of Progress as a comparison.

Q. Just tell us what the financial outcome was of the San Diego Fair?

Mr. Christensen: To which we object as being immaterial to any issues here presented. [430]

(Testimony of Wayne Dailard)

The Court: Overruled.

A. We finished the second year of the Fair with the entire subscription returned to the public. In other words, the premise upon which the Exposition was built was a contribution returnable if earned. It was not a debenture or bond issue; it was returnable to the individual citizen only if earned.

We returned the entire subscribed investment made by, or contributions made by the public.

We left, I think, nine substantially built concrete buildings, a completely improved park of 1400 acres. All of our equipment was left to the City of San Diego.

Beyond that, we had in our fund some \$126,000 which was held—some of it is being held yet—to satisfy any claims that might come up in the years following the dissolution of the corporation.

Our Fair was eminently successful.

Q. By Mr. Doherty: During the operation of that Fair did you have any form of entertainment as a part of it?

A. That was the first policy I instituted, and probably the most worthwhile thing I contributed to the Fair, was the fact that I immediately put in strong nationally known attractions. And recovery, I should say, because the corporation was in very bad shape when I took over, can be traced to the first day that we presented an attraction in the fair- [431] grounds.

I spent—that is an estimate; I could get it accurate—I think, possibly, during the entire operation of the Fair I administered well over a million dollars for entertainment of various forms. I brought the Mexico City

(Testimony of Wayne Dailard)

Municipal orchestra, I brought the American Choir, and other attractions would be attractions such as Sally Rand, a band like Ben Bernie, the Canadian Mounted Police Troup. We brought a variety, a widespread variety of entertainment which was intended to attract every class of people. We brought, I think, the Philadelphia Philharmonic; we had the San Francisco Symphony; we induced the Ford Motor Company to build us a bowl and sponsor a season of sixteen weeks of popular symphony programs. I would say, in short, that we did everything to strengthen the entertainment. We even presented versions of musical comedy, light opera, like *The Mikado*, things of that nature. We covered, I think, practically every field. We presented rodeos, horse shows—well, just about anything you can think of in the way of entertainment we gave them, because we had a widespread appetite in amusements which were to be satisfied.

Q. What experience during that period of operating the Fair did you gain from what are known as bands, or dance bands?

A. We had a building called the Recreation Building but [432] we had difficulty in finding a reason for it. The building had been built. We finally stumbled onto a policy, a ballroom policy. I say "stumbled" because it was quite an accident. We had booked a band. We had nothing to do with it, so we put it in the Recreation Palace. The thing was phenomenally successful. I mean by that, the youngsters paid their attendance outside of the grounds, paid their attendance into the grounds and paid another admission to get into the ballroom to

(Testimony of Wayne Dailard)

hear those bands. So we instituted a policy then and for the remainder of the season of name bands, and some local bands, and we carried on the ballroom policy because it was highly successful. I say it was highly successful, for this reason: they first had to pay an admission to get into the grounds and then they had to pay an admission into the ballroom in order to dance, and during those times it was quite a tariff for youngsters to lay down \$2.00 apiece to get in to dance.

That is where we gained our first knowledge of the appetite in San Diego for name and semi-name attractions.

Q. After the Fair closed you took over what is known as Mission Beach? A. That is correct, sir.

Q. And who had operated it previous to that time?

A. Immediately previous to us, the City of San Diego.

Q. And I believe it had been testified here by Mayor [433] Knox that that was a failure?

A. It was, notoriously.

Q. In 1940, I believe it was operated by you, Mission Beach?

A. If my memory serves me correct, we had a management agreement, a short-term management agreement which started in 1939. I may be wrong about this, but I think our initial lease started in 1940. You are correct; but we had a short-term management agreement ahead of that, and it was just for a few months.

Q. What type of bands did you use out at Mission Beach during the two years?

A. Well, we used about everything out there. We used shows; we used attractions; we used the best bands

(Testimony of Wayne Dailard)

that we could buy; we used local bands; we used Hill-billy bands; but none were successful.

Q. What was your observation as to the drawing power of so-called swing bands of the type known here and referred to as—oh, the Guy Lombardo type and that type of band?

A. The weather conditions—I point that out because there is about 7 months a year at Mission Beach that the weather is adverse to consistent operations—with favorable weather conditions, with everything being in our favor, name bands did modestly well. In some instances they would make a few dollars and in some instances they only broke even— [434] even in the best conditions. That is a matter of record, that we have the grosses.

Mr. Christensen: What was the last part of that answer?

(Last part of answer read by the reporter.)

The Court: I do not understand that term.

Mr. Christensen: I do not understand the term.

The Witness: Well, we have the grosses. He is asking about a certain period at Mission Beach.

The Court: Do you mean gross returns?

The Witness: We have those, yes, our gross returns on it.

The Court: I understand that you are referring to gross returns.

Q. By Mr. Doherty: Did you make a profit during those two years that you were using this type of operation?

A. No, sir.

(Testimony of Wayne Dailard)

Q. Were you experimenting during those two years as to the type of operation that would be a success at Mission Beach? A. Yes, sir.

Q. And after those two years of experimentation, what did you conclude were the types of entertainment that would be not only well attended and patronized, but would be profitable?

A. We were never able to influence what we refer to as [435] the consistent high grade of business into Mission Beach. There were many factors involved in it: The fact that the plant is 7 or 8 or 9 miles from San Diego; the fact that previous to any of our entry into the Mission Beach situation, the place had gained an extremely rugged name—I mean a very bad name. We were never able to overcome that one phase.

Now, we depended in San Diego upon the youngsters from good families. That has been our life blood there, even at Pacific Square, up until the middle of 1944, when, of course, the town was taken over by servicemen. But we had depended, by the date that you are discussing now, upon these youngsters. We found that we could bring them into the Fair, even at an exorbitant price; but we were never able to bring them into Mission Beach, even with attractions that they wanted to see.

We even went so far as to put out surveys. I know practically everyone in the community, and we put out surveys to determine why John Jones' son and daughter did not attend Mission Beach; and we were told that they did not like the atmosphere and environment.

Mr. Christensen: Just a moment. I am going to object to this as hearsay.

(Testimony of Wayne Dailard)

The Witness: It is not hearsay. We were told it.

The Court: Mr. Dailard.

The Witness: Excuse me. [436]

The Court: You just let the lawyers and the court take care of the legal phases and do not interpose your own ideas when counsel makes an objection.

The Witness: Thank you, sir.

The Court: I think a great deal of that was repute, which he was not asked for. He was asked for his own experiences, and that is part of his testimony with reference to cross-examination. You will confine yourself to the question, now, and we will not be delayed.

Mr. Christensen: Will your Honor strike it?

The Court: That part, ladies and gentlemen, in which it was reported and the repute was, etc., will go out, and you will disregard it.

Q. By Mr. Doherty: Now going back a minute, Mr. Dailard, after you had been operating at Mission Beach a time, did you—I withdraw that. Was there any large downtown dance hall or ballroom in existence at that time, when you first took over Mission Beach?

A. No, sir.

Q. What steps did you take then, and when, to build Pacific Square?

A. In 1940. I had previously owned the property at Pacific and Ash Street, and in 1940 we started the erection of the present Pacific Square room.

Q. And when was it opened? [437]

A. December 28, 1940.

(Testimony of Wayne Dailard)

Q. What type of entertainment did you use in Pacific Square from the time it opened?

A. We confined ourselves—I can answer that by saying this: That we have had no change. We have never changed policy in Pacific Square since the first week's opening. We opened up with name bands, semi-name bands and local names; and we have carried that policy through for the duration of our operations.

Q. How did that operation of Pacific Square compare with the operation that you finally determined upon as the best operation for Mission Beach?

A. Well it was far more profitable, because our location was in our favor and the fact that the plant was new and fresh.

Q. And did you always get good responses at Pacific Square for what we call name dance bands?

A. I can answer that by saying that we never had an unprofitable week. Our records show that we have never had a red week in Pacific Square.

Q. What type of entertainment from the standpoint of bands or other form of entertainment did you conclude, from your experience, that you found the most attractive for Mission Beach in 1943, '44, '45?

A. Well, in 1942, as an additional experiment, we brought [438] in a cowboy band, a band called Bob Wills. We were solely responsible for Bob Wills coming to this territory. We brought him here from Oklahoma, and we had an immediate tremendous success with Wills, and we immediately adopted the western type of music for Mission Beach. The class of people that chose to attend Mission Beach understood that. It

(Testimony of Wayne Dailard)

was no effort to bring them in for something that they understood.

Q. How long did you continue that policy at Mission Beach?

A. We continued that until our lease expired.

Q. Was Bob Wills secured through the services of the Music Corporation of America?

A. He was later. They took him under management. We brought him to this country and he chose them as his agent.

Q. In other words, you hired him direct at first?

A. Yes. I think we had—I would have to consult records for accuracy, but I think we had Wills for one year before he went under the wing of any agent.

Q. And 1942, 1943, 1944, and up to the time you sold in 1945, you then specialized at Mission Beach in that type of entertainment, the so-called western bands?

A. That is correct. We deviated occasionally. I don't think we deviated from the western policy over two or three times during that period of time, maybe four times. [439]

Q. How did the success of the operation, financially, compare under the new type of operation with what you had been previously using?

A. Well, the figures will answer that. I lost in the first two years' operation of Mission Beach approximately \$36,000; and the last three years of our operations were all profitable, as has been submitted here.

Q. By those figures, the same figures which were read in evidence on the Mission Beach for the year 1942, you made about \$50,000 at Mission Beach?

A. Yes, yes.

(Testimony of Wayne Dailard)

Q. And that was the first year you began using this new type of entertainment? A. That is right.

Q. And the year 1943 you made \$72,759.66?

A. That is correct.

Q. And was that under this same type of operation?

A. Yes.

Q. And in 1944 you made \$79,924.53 at Mission Beach? A. That is correct.

Q. Now, in 1945 you only operated the first six months? A. In 1945?

Q. Yes.

A. We did not operate the first six. That shows the first— [440]

Q. Pacific Square, yes? A. That is right.

Q. I got confused. Mr. Finley operated it during 1945. You know Mayor Knox? A. Yes.

Q. Did you have a conversation with him in 1944 respecting a renewal of the lease that you had on Mission Beach? A. Yes.

Mr. Christensen: To which we object as not proper cross-examination.

The Court: Well, let's see where the foundation is. Where is the foundation for it, Major?

Mr. Doherty: Well, there was no question asked this witness on direct, I will admit, respecting the conversation with Mayor Knox; but the whole field of the operation was opened up.

The Court: No. That is defensive matter, unless you laid the foundation. Sustained.

Mr. Doherty: I never disobey your Honor.

The Court: Don't do it now.

(Testimony of Wayne Dailard)

Mr. Doherty: May I answer your Honor's question what the foundation was for it?

The Court: No, unless there is some foundation. You have a transcript, a daily transcript, and so has the court. [441]

Mr. Doherty: The exhibit, your Honor, is the basis for it, the offer that went into evidence. Now, I am entitled, I think, to inquire into the preliminaries.

The Court: You are entitled to inquire into the preliminaries at the proper stage of the case, undoubtedly, and this is not that stage. Objection sustained.

Mr. Doherty: Will that ruling, then, apply—so I will not run counter to your Honor's ruling—to all questions respecting the testimony here of the other two city officials and the Lieutenant Commander about conditions at the Beach?

The Court: The scope of the ruling is just as announced, and is not anticipatory of anything.

Q. By Mr. Doherty: Mr. Dailard, there was introduced yesterday an agreement or an offer by you to the City Council at San Diego; and I think the day preceding, there were introduced some other documents which I wish to show you. Please look at Defendants' Exhibit E, being the letter from Music Corporation of America on November 4, 1941, addressed to Pacific Square Corporation, and I will ask you if you identify that document?

A. Yes, sir.

Q. And was that the arrangement between you and the Music Corporation of America respecting bands at Pacific Square and Mission Beach?

A. That is so.

[442]

(Testimony of Wayne Dailard)

Q. I will show you Defendants' Exhibit F, being an agreement dated the 3rd day of May, 1944, and ask if you can identify that? A. Yes.

Q. What other agreements, either oral or written, did you have with Music Corporation of America respecting the use of their services?

Mr. Christensen: To which we object as not proper cross-examination.

The Court: Overruled.

A. We had no other agreements.

Q. By Mr. Doherty: Did you have any written or oral agreement with any of the officers or employees of Music Corporation of America other than as is contained in those documents respecting the use of facilities and service of Music Corporation of America?

A. No, sir.

Q. And when I say "officers or employees" I mean these gentlemen who are defendants in this matter?

A. No, sir.

Q. Was that the only and sole agreement you had with Music Corporation of America respecting their services and facilities? A. Yes, sir.

Q. I will show you now Plaintiff's Exhibit 6, being [443] your offer to the City of San Diego, which was read into evidence yesterday. Who prepared that document? A. My secretary and a local attorney.

Q. Were they residents of San Diego? A. Yes.

Q. What connection, if any, did the Music Corporation of America or any of its officers or employees have in preparing that document? A. None.

(Testimony of Wayne Dailard)

Q. Were they ever consulted by you or any of your employees? A. No, sir.

Q. Did they know, to your knowledge, that such an offer was being made—I mean the contents of the offer?

A. They knew nothing of the contents. I was trying to think whether they even knew for sure that we were going to bid. I don't know. They might have known it.

Q. That is, might have known that you were going to bid? A. Yes.

Q. Did you ever show that document to any of the employees or officers of Music Corporation of America? A. No, sir.

Q. I will direct your attention to one sentence in this document; it is on page 4, in subparagraph 5 of Exhibit [444] 6: "We have an agreement with the Music Corporation of America granting to us the exclusive rights of presentation in San Diego County of attractions controlled by said corporation." Were you referring to Defendants' Exhibits E and F in that statement?

A. Well, frankly, I didn't even know that statement was in there until it was brought out during this court trial.

Q. I will call your attention to another statement in the same paragraph, on page 4:

"The Music Corporation of America controls the booking of ninety-five per cent of all name bands in this country."

Did you ever consult the Music Corporation of America respecting that statement? A. No, sir.

Q. Or any of its employees or officers?

A. No, sir.

(Testimony of Wayne Dailard)

Q. When did you first know or did it come to your attention that statement was in there?

A. When the plaintiff's attorneys took my deposition.

Q. And when was that?

A. It is a matter of record. I don't know.

Q. Didn't you read this over before you turned it in to the City Council? [445]

A. Strange as it may seem, I did not, sir.

Q. Did the Music Corporation of America or any of its officers or employees ever say to you that they controlled any bands? A. No, sir.

Q. Did they ever say to you that they were employment agents or representatives of ninety-five per cent, or any other per cent, of name bands? A. No, sir.

Q. That was a matter, then, inserted by your secretary and your attorney without consulting you, or, so far as you know, with defendants?

A. That is correct, sir.

Q. This contract, Exhibit F, I will call your attention to the last paragraph, I believe, in it—it is next to the last paragraph—it is on page 5, Mr. Reporter, and designated 9. It reads, Mr. Dailard:

“This agreement is personal to the parties hereto and is not transferrable to any other parties, firms, persons or corporations.”

You are familiar with that provision? A. Yes.
[446]

Q. At the time of your sale to Mr. Stutz of your properties, that is, the Pacific Square, did you have any

(Testimony of Wayne Dailard)

conversation with anybody representing Music Corporation of America about that part of the contract?

A. Yes.

Q. What was said?

Mr. Christensen: To which we object as hearsay and not proper cross-examination.

The Court: Objection sustained.

Q. By Mr. Doherty: Look at Defendants' Exhibit E, the letter of November the 4th. Can you give me the circumstances of how that letter happened to be written?

A. We were—this was in connection with Pacific Square—we had issued or we had put on the market an issue of stock, and one of the resisting factors that the brokerage firm was being confronted with was the fact that we had nothing to assure, after the plant was built, that it could be serviced with bands. So I went to—I can't recall the first contact I made with Music Corporation of America, and asked them if they would give me something in writing that they would service the account, everything being as it should be, and we finally arrived at this option of first refusal. That was in 1941. We didn't feel like investing in a plant unless we had some, at least, fairly tangible assurance that some one would consider serving us. The reason for that [447] situation was that—

Mr. Christensen: To which we object as not responsive and hearsay.

The Court: I don't see how they could cross-examine on that. Read the question, please.

(The question was read.)

The Court: That is a broad question.

(Testimony of Wayne Dailard)

Mr. Doherty: Conspiracy, your Honor, is a broad charge.

The Court: Just read the last part of his answer, when he was interrupted.

(The portion of the answer referred to was read.)

The Court: Yes, he is charged as a co-conspirator by the plaintiffs in the case. Objection overruled. Proceed.

The Witness: Will you read my answer, and the question, please?

(The record referred to was read.)

The Witness: (Continuing)—the band leaders we felt might be skeptical about playing a new situation. I say we felt that. That seemed to be the feeling of the entire group interested in building Pacific Square, because there had been no precedent.

Mr. Christensen: Just a minute. May that be stricken, your Honor, as a conclusion and opinion, predicated on hearsay?

The Court: If you will confine your answer, Mr. Dailard, I want to give you the widest scope, so far as you are [448] concerned, but confine it to yourself. If you can use the singular personal pronoun instead of "we", it would more accurately reflect the answer that you should give to that question.

The Witness: Am I still answering that?

The Court: Yes. We will have the witness' answer read. Now, if you understand the rule, it is that we want you to speak just as to yourself and to use the personal pronoun "I", if you can, because it destroys the sequence and continuity of the narrative to be interrupted. You should confine yourself to your own activities, and,

(Testimony of Wayne Dailard)

as I say, instead of using the plural personal pronoun "we", use the first person.

Now, read the answer, please.

(The answer was read.)

The Witness: I think that answers it.

Mr. Christensen: Your Honor, may that latter portion be stricken?

The Court: That part where he purports to state how others felt may go out, but the part with respect to himself, of course, will remain.

Now, will you proceed, and we will not interrupt you again if you will bear in mind the observation and ruling of the court.

The Witness: Thank you, sir. [449]

The Court: Proceed. Have you finished your answer?

The Witness: Yes.

Q. By Mr. Doherty: Mr. Dailard, did Music Corporation of America, and when I say "Music Corporation of America" I mean the defendants or their employees, seek you out and ask you to give them such an arrangement? A. No.

Q. At whose instigation or suggestion was the letter written? A. It was my suggestion.

Q. Did you have several conferences with them about it? A. I think probably six or seven.

Q. During any of those conferences, before entering into the signing of the letter, or at any time since that time, have there ever been any discussions or conversations between you and the defendants, or any other official or employee of the Music Corporation of America,

(Testimony of Wayne Dailard)

that the purpose of that agreement was to exclude competition in the dance or entertainment business in San Diego? A. No.

Q. Was it ever discussed? A. No.

Q. Mr. Dailard, did it ever come into your head that any charge like that would be made against you with respect to that agreement? [450] A. No, sir.

Mr. Christensen: To which we object as immaterial to any issue. It is his opinion or conclusion.

The Court: No, it isn't his opinion. It is his intent. Overruled.

The Witness: No, sir.

Q. By Mr. Doherty: I direct your attention to some of the advertisements that were introduced here yesterday. They are Plaintiff's Exhibit 7. Will you please look at them, Mr. Dailard? A. Yes, sir.

Q. Would you read the first opening two lines on that?

A. "Do not be confused. Pacific Square will continue to present 90 per cent of all name bands."

Q. What was the reason for the statement or advertisement, "Do not be confused"?

A. Mr. Finley had presented an ad earlier in the week saying that—

Mr. Christensen: Just a minute. To which we object as not the best evidence here.

Mr. Doherty: Well, I will give you the best evidence.

Mr. Christensen: Thank you.

The Court: While you are looking for that, I think we will take our recess for a few minutes. Ladies and

(Testimony of Wayne Dailard)

gentlemen, remember the admonition, and keep its terms inviolate. Occupy [451] the jury rooms, please.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Doherty: Miss Reporter, will you please read the last question, the one to which an objection was made?

(The record was read.)

Mr. Doherty: I have shown to counsel for the plaintiff ads in the San Diego newspapers in the issues of Friday, May 11th.

Q. By Mr. Doherty: Directing your attention, Mr. Dailard, to one ad, I will ask you if you recognize that advertisement? A. Yes.

Q. We had better finish with that one first. Is that one of the ads you had in mind when you ran the ad that is marked Plaintiff's Exhibit 7, and which is before you?

A. Well, not specifically. This isn't the specific instance that I had in mind.

Q. I will show you now another advertisement in the San Diego paper, Friday, May 11th, and ask you if you recognize the ad. (Handing document to witness.)

A. Yes, sir.

Q. Is that the ad you had in mind when you ran the ads set forth in Plaintiff's Exhibit 7?

A. Yes, this ad and variations of this ad. [452]

Mr. Doherty: May we offer in evidence, your Honor, the first document as Defendants' Exhibit—G, is it?

The Clerk: G, yes, sir.

Mr. Doherty: I have shown it to counsel for plaintiff.

Mr. Christensen: Yes, you have.

(Testimony of Wayne Dailard)

The Court: So ordered.

(The document referred to was marked as Defendants' Exhibit G, and was received in evidence.)

The Court: That is 1945. Was it May, 1945?

The Witness: Yes, your Honor.

Mr. Doherty: Yes, your Honor, Friday, May 11, 1945.

The Court: So ordered.

Mr. Doherty: The other advertisement is in another newspaper. That will be H?

The Clerk: Defendants' Exhibit H.

(The document referred to was marked as Defendants' Exhibit H, and was received in evidence.)

Mr. Christensen: Mr. Doherty, could we have just the single sheet in which that appears, because it might possibly encumber the record; if it will serve your purpose.

The Court: Are they in the same paper, "The Journal," or were they in both "The Journal" and "The Tribune"?

The Witness: I think they ran in both "The Journal" and "The Tribune."

The Court: That looks like "The Journal." [453]

Mr. Doherty: This is "The Journal," I am satisfied.

I have torn off, Mr. Christensen, the sheet with the ad on the reverse side, but they don't have any date line on it or the name of the paper.

The Court: Probably the red sheet has.

(Testimony of Wayne Dailard)

Mr. Christensen: I will agree with you on it in a moment, Mr. Doherty, that it is in the "San Diego Journal," and it is the issue of Friday, May 11, 1945.

Mr. Doherty: That is Exhibit H?

The Clerk: Yes, sir.

Mr. Doherty: May I read just the headlines to the jury?

The Court: Yes.

Mr. Doherty: Exhibit G is an advertisement, "Frankie Carle opens tonight at Mission Beach. Frankie Carle leads the parade of world's greatest dance bands to the West's most spacious ballroom. Now . . . Dancing Every night! Gala summer opening tonite. Dancing 8:30 to 1. 'The Golden Touch of' Frankie Carle, his piano and his orchestra, featuring Paul Allen, Lee Columbo, lovely Phyllis Lynne. Continuous dancing with Paul Martin and his music featuring The 3 Barries, sensational singing trio. Admission \$1.25, tax included."

Now, the other advertisement, Exhibit H:

"Tonight gala summer opening. Now dance nitely Mission Beach. New home of big name bands. The Golden Touch of Frankie Carle, his piano and his orchestra," and some more. [454] "Mission Beach Ballroom and Amusement Park."

Q. By Mr. Doherty: What particular part of that advertisement, Mr. Dailard, inspired you or caused you to run the ads which I have already referred to here, Plaintiff's Exhibit 7?

A. The part that refers to the new home of big name bands.

(Testimony of Wayne Dailard)

Q. Now, will you look at Plaintiff's Exhibit 7, and look down on the list of bands which you state will play in Pacific Square, and tell me whether or not those are bands represented solely or entirely by Music Corporation of America?

Mr. Christensen: To which we object as calling for his conclusion or opinion.

The Court: I think he is qualified to answer. Overruled.

The Witness: Will you read the question?

(The question was read.)

The Witness: No, sir.

Q. By Mr. Doherty: Are there bands there represented by other agencies? A. Yes, sir.

Q. During your operation of Mission Beach and Pacific Square, did you use the facilities of other agencies?

A. Yes.

Q. During your entire operation? [455]

A. Yes, sir.

Q. Did you consult the Music Corporation of America, or with any of its officers or employees, or any of the defendants, before that advertisement known as Exhibit No. 7 was put in the paper? A. No, sir.

Q. To your knowledge, did they see it?

A. No, sir.

Q. The statement at the bottom of the ad, referring against to No. 7, "The Music Corporation of America bands," did you consult any of the defendants or the corporation, or any of its employees, when you put that in?

A. No, sir. That was a part of our regular signature.

(Testimony of Wayne Dailard)

Q. By the way, how many times before this lawsuit started had you met Mr. Stein, the president of the Music Corporation?

A. I met Mr. Stein the day of—no, the day after this trial opened for the first time.

Q. There is one question I forgot to ask you, Mr. Dailard, this morning. This letter of November 4, 1941,—that is Defendants' Exhibit E, isn't it? A. Yes.

Q. Was there a previous letter to that one in existence? A. There was a very vague letter, yes.

Q. Have you been able to find it? [456] A. No.

Q. Had that previous letter a reference to an arrangement with Music Corporation of America and the bands?

A. The substance of the letter was that if and when this ballroom would open, that they would service us.

Q. And that was when you were building the plant?

A. That is correct.

Q. While these contracts were in effect, have you ever dealt directly with band leaders, without going through M.C.A., or any other agency?

A. Many times.

Q. And made contracts direct with them?

A. Yes.

Mr. Doherty: I believe rather than take up the time of the court, Mr. Christensen, may it be agreed and stipulated that in all these cases each engagement of a band leader at a ballroom is a separate individual contract? In other words, there is no blanket arrangement, but they sign for an engagement, for each individual showing or presentation at a ballroom?

Mr. Christensen: I don't believe that is a correct statement.

(Testimony of Wayne Dailard)

Q. By Mr. Doherty: Mr. Dailard, did you ever, in all your dealings down there, enter into any blanket contracts where you would buy or agree to take or engage a whole [457] series of bands in one contract?

A. No.

Q. Was each individual engagement a separate contract on the form prescribed by the Musicians Union?

A. That is correct.

Q. My associates have handed me some pictures of Pacific Square taken from another position. I have shown them to counsel. I will ask you to examine them, to look at them, and ask you if they are true representations of Pacific Square from another viewpoint. (Handing photographs to witness.)

A. Yes, sir.

Mr. Doherty: May we offer those in evidence, your Honor?

The Court: Yes.

The Clerk: Exhibit I. As one exhibit?

Mr. Doherty: I think we might as well throw them in as one exhibit. That will be Defendants' Exhibit I?

The Clerk: Yes, sir.

The Court: How many are there?

The Clerk: Five, your Honor.

The Court: So ordered. Defendants' Exhibit I.

(The documents referred to were marked as Defendants' Exhibit I, and were received in evidence.)

Mr. Doherty: Before you clip them together, may I show them to the jury, your Honor? [458]

The Court: Yes.

(The photographs were handed to the jury.)

(Testimony of Wayne Dailard)

Mr. Doherty: While the jury looks at that series of pictures, your Honor, I have a series of pictures of the interior of Pacific Square. May we get through with them at the same time? I have shown them to counsel.

Mr. Christensen: Yes. Go right ahead.

The Court: Yes.

Q. By Mr. Doherty: Mr. Dailard, I am showing you a series of pictures which purport to be pictures of the interior of Pacific Square, and ask you if those photographs are a true representation of the interior of that dance hall. (Handing photographs to witness.)

A. Yes, sir.

Mr. Doherty: May we offer them, your Honor, as Defendants' Exhibit J?

The Court: How many are there?

The Clerk: Six, your Honor.

Mr. Doherty: Six in number.

The Court: Any objection, gentlemen?

Mr. Christensen: No, your Honor.

The Court: So ordered.

(The photographs referred to were marked as Defendants' Exhibit J, and were received in evidence.)

Mr. Doherty: May I show them to the jury, your Honor, [459] while they are looking at the others?

The Court: Yes, sir.

(The photographs referred to were handed to the jury.)

Q. By Mr. Doherty: Have you before you the advertisements on the smaller sheets? Plaintiff's—this one here (indicating), I believe.

The Court: Exhibit 7?

Mr. Doherty: Yes, Exhibit No. 7.

(Testimony of Wayne Dailard)

Q. By Mr. Doherty: Where did the idea of "90 per cent of all name bands" originate?

A. We originated and used that slogan in 1941, and the reason for it was that at the time we opened our youngsters had been coming up to the Palladium, and they expressed certain doubts as to whether or not we were really going to bring the big attractions to San Diego.

Mr. Christensen: To which we object as calling for hearsay as to what other people had done, or said, or expressed; particularly, their doubts.

The Court: I think his reasons are material. I don't know that it is necessary to detail the source of the knowledge, Mr. Dailard, but anything that is operative in your mind is proper to disclose. I don't know whether we want to bring these folk that you call youngsters up here or not, give the other side the opportunity to do that, and it isn't necessary to go into the details of that matter. Anything [460] that was operative in your mind as to the matter is proper but narrating as to youngsters or young people, or anything of that kind, would not be essential in anything of that kind.

The Witness: All right, sir.

The Court: Do you understand that?

The Witness: Yes. Where was I? Will you repeat my answer?

Mr. Doherty: And repeat the question, please.

(The record was read.)

The Witness: (Continuing) We found it necessary to coin a slogan.

(Testimony of Wayne Dailard)

Q. By Mr. Doherty: I will put it this way, Mr. Dailard, and see if it will help you: Was that sort of an entertainment ballroom in San Diego, the type of Pacific Square, something that was new to that community? A. Yes.

Q. Did you receive complaints or inquiries or suggestions from any of your customers that had patronized Pacific Square respecting the type of entertainment you would or would not have? A. Yes.

Q. And what was the nature of those suggestions or inquiries you received?

A. The nature of the inquiries— [461]

Q. I didn't mean to give the names of individuals, or the groups.

Mr. Christensen: That is objected to as being immaterial and calling for hearsay.

The Court: Overruled. He has modified the question to make it proper.

Mr. Doherty: Will you read the question?

(The record was read.)

The Witness: A. The inquiries were, "Who is coming? What will your permanent policy be?" So I coined this phrase, keeping in mind such phrases as, "When a better car is built, Buick will build it," or "Good pipes smoke more Prince Albert tobacco than any other tobacco." We had all the product available for the community, because we had one institution, so we coined this phrase and sustained it throughout our operation. Our ads will evidence we used this constantly since Pacific Square opened, "90 per cent of all name bands will play Pacific Square."

(Testimony of Wayne Dailard)

Q. By Mr. Doherty: Irrespective of the agency from which they came? A. That is true.

Q. I will show you Plaintiff's Exhibit 9, which is a list of bands playing at Mission Beach and Pacific Square, and ask you to start in the year 1943 and go through that entire year, and tell me how many bands played at Mission Beach during [462] 1943 that were not western or cowboy or hill-billy bands, whatever classification you want to give them, those that were not of that class, at Mission Beach? Take each year separately, Mr. Dailard,—1943?

A. You asked 1943 and 1944?

Q. No, take them separately. Take 1943; then take 1944.

A. There were four bands in 1944 that were not western bands, according to this list.

Q. What about 1943? I started you there at the top of the list of 1943. I wish you would check it again to see if your tally conforms to mine.

A. We had one band in 1943 that was not a western band.

Q. And how many in 1944? You state four?

A. Four. That is correct.

Q. You are confining your examination now just to Mission Beach? A. Yes, sir.

Q. On February 3, 1945, Mr. Finley opened at Mission Beach, and you were still operating Pacific Square at that time, were you not? A. Yes, sir.

Q. Which band did you have or what band did you have at Pacific Square on February 3, 1945?

A. Vaughn Monroe. [463]

(Testimony of Wayne Dailard)

Q. What is that again? A. Vaughn Monroe.

Q. And what agency was that band secured through?

A. The William Morris.

Q. And what band did Mr. Finley have over at Mission Beach? A. Henry Busse.

Q. What agency was that secured through?

A. William Morris.

Q. In this statement of profits from Pacific Square, Mr. Dailard, you gave us totals for the years of 1942, '43, '44, and '45. They were read into evidence yesterday when Mr. Christensen was examining you. What portion of those profits were earned the first six months, and what portion the second six months, from your observation?

A. Well, I have always contended that we had three summer months and three winter months, and that there was very little variation over a six months period. I think that would be proven if we checked it accurately. I think there is about an even division.

Q. In other words, as of July 1st you would have made half of your earnings?

A. I would say so, yes.

Q. Now, it shows here in 1944, from the figures you testified to yesterday, that Pacific Square made a profit for [464] the entire year of \$169,582.28, and in 1945 for the first six months your profits were about \$30,000.00. How do you account for the rapid drop of earnings of Pacific Square during that period, the first six months of 1945?

A. Well, there are probably two factors. The first factor, of course, Mr. Finley's operation at Mission Beach. That undoubtedly took some of our gross. The

(Testimony of Wayne Dailard)

second, and probably synonymous with that or equally important, was the fact that the war workers, or, the war plants had started laying off tremendous amounts of men during that period. I think the two factors would contribute possibly equally to that.

Q. Have you been familiar with the operation, just in a general way without knowing the details, in the last six months of 1945, from your observation?

A. I know very little about it, sir.

Mr. Christensen: To which we object as calling for his conclusion or opinion.

The Court: He said he knew very little about it, Major.

Mr. Doherty: Yes, sir.

Q. By Mr. Doherty: Have you been around to observe it?

A. I checked the operations, yes.

Q. Has it been on the upgrade or downgrade?

A. Deviation—

Mr. Christensen: To which we object as calling for his [465] conclusion or opinion.

The Court: Yes, sustained.

Mr. Doherty: I will withdraw it.

Q. By Mr. Doherty: What was the weather condition out at Mission Beach during a part of the year? Was there always good weather at Mission Beach?

Mr. Christensen: To which we object as indefinite and uncertain, as to when in time.

Q. By Mr. Doherty: Well, during your period of operations?

A. Our experience at Mission Beach was that the only dependable period was during the summer months, from May 30th until Labor Day, where you could rely

(Testimony of Wayne Dailard)

upon weather. We have had high tides that flooded the ballroom in the winter-time. We have had extremely foggy weather, where you could not find your way out there. Now, that is prevalent in any beach area, and it is not isolated to San Diego. The weather is very uncertain in the winter months.

Q. What effect does it have on the attendance?

A. It has only this effect, that if you get a fog that starts at 6:00 o'clock, and usually it will hold from 6:00 to 10:00 o'clock at night, then you have no business, because it is unsafe driving.

Q. What means of transportation was there from the city of San Diego on out to Mission Beach? [466]

A. When we first started up there, there was a street car line. That has since been supplanted by a bus line.

Q. The bus line is now operating?

A. That is true.

Mr. Doherty: May I ask counsel a question? I am skipping around, your Honor, in view of your Honor's ruling on some questions I wanted to ask, and that has caused me to be a little delayed.

The Court: What is the distance of the Mission Beach Amusement Center from the metropolitan area of the city of San Diego?

The Witness: It is about eight miles.

The Court: What is the distance of the Pacific Square Gardens from the metropolitan district of San Diego?

The Witness: About five blocks.

Q. By Mr. Doherty: Mr. Dailard, one question is suggested. On direct examination Mr. Warne states that you testified that on New Year's Day, I believe it was,

(Testimony of Wayne Dailard)

you played at Pacific Square Barnet, and at Mission Beach Keaton or Kenton, is that correct, or some other so-called name band?

Mr. Christensen: In what year, sir?

The Witness: I remember one year playing Charlie Barnet and Harry Owens.

Q. By Mr. Doherty: Well, whichever it was.

A. Yes. I think that was our last New Year's. [467]

Q. That was New Year's, 1945?

A. That is correct.

Q. What was the occasion of playing other than western music, so-called, at Mission Beach on that occasion?

A. Well, of course, on New Year's Eve you have got more business than anybody can take care of in almost any community, if the weather is favorable, and if I remember, we had no western band of any consequence available. Therefore it was necessary that we play a modern type of band.

Mr. Doherty: I believe that is all at this time. [468]

Redirect Examination

By Mr. Christensen:

Q. Both Barnet and Owens are M. C. A. bands?

A. That is correct.

Q. Your Pacific Square is located just one block from the waterfront, isn't it?

A. Approximately, yes.

Q. Approximately the same distance as the Mission Beach ballroom is located from the waterfront?

A. That is correct.

(Testimony of Wayne Dailard)

Q. And the fog you spoke of is just as prevalent at Pacific Square as it is at Mission Beach, isn't it?

A. I believe that is incorrect, sir.

The Court: Mission Beach is located on the ocean frontage?

The Witness: That is right; and we are on a land-locked, still-water harbor.

The Court: You are on the San Diego Bay, are you?

The Witness: That is correct. We are several miles from the ocean.

Q. By Mr. Christensen: As a matter of fact, the airports are right close by there?

A. That is correct.

Q. To Pacific Square? A. That is right. [469]

Q. And fog is so bad that flights are cancelled with great frequency, are they not, sir?

A. That I wouldn't know.

Q. There is a lot of fog there at Pacific Square, isn't there?

A. That is undeniable. I am not a weather expert. I imagine we could get vital statistics on that. Your question to me was: Is the fog as bad at Pacific Square as it is at Mission Beach? And I said, "No," I didn't think that was the case.

Q. You do not believe it is quite as heavy?

A. Certainly not.

Q. Now, you were asked there concerning the list of bands listed under your ad there. It says, "Do not be confused." You say those are not all name bands?

A. I did not say that.

Q. I beg your pardon. They are not all M. C. A. bands? A. That is correct.

(Testimony of Wayne Dailard)

Q. I believe there are about 27 of them listed there?

A. Yes.

Q. Not over three of them are not M. C. A. bands; that is true, isn't it?

A. I do not know. Do you want me to check them?

A. Well, look.

A. I think there are four. [470]

Q. Will you name them?

A. I am not—and possibly five. I would have to consult records to verify it.

Q. Name the bands that you are referring to.

A. Well there is Henry Busse, Charlie Spivak, Vaughn Monroe, Freddie Slack.

Q. Who represents Freddie Slack?

A. Well, that I don't know. That is the one I said was optional upon a check of records. And I am not positive that Hal McIntyre is under Music Corporation. That I would have to check.

Q. How did you know that Slack was coming, then?

A. Well, isn't it reasonable to assume that if a band has played your place since they were a band, that they would return and play it? Isn't that a reasonable assumption?

Q. I really wouldn't know, Mr. Dailard.

A. Well, I am suggesting that as an answer.

Q. Had you contracts with Henry Busse to appear at the time you put that ad in? A. No.

Q. Had you any contract with Spivak to appear at the time?

A. That I don't know without consulting records.

(Testimony of Wayne Dailard)

Q. Had you a contract with Monroe to appear there at the time you put the ad in? [471]

A. I think he was booked, yes. I am not positive of that, but I believe he was.

Q. Well, it is quite the practice, is it not, to book an orchestra for several weekends? A. No.

Q. At one time?

A. No, it is not; but it is a prominent practice—you can take any motion picture theatre in America, and at the season of September 1st they will advertise the pictures that are not even made as coming; they will advertise the company that is even going to make the picture, appear in the picture. They tell that, not because they have paid them, but because they have been doing business with the companies and they rely upon the company to continue and serve them. I have the same reliance that I put in Music Corporation, in William Morris and the other agencies when this ad was run, not because, when Mr. Finley came into the picture, that I thought they were all going to discontinue serving me. That does not bear out the picture of good business.

Q. You knew that every M. C. A. band that was available in that area, that you would take, didn't you?

A. I knew that I would take them, everything being equal and the prices not being exorbitant.

Q. Well, did you ever turn any M. C. A. band down because of price? [472]

A. No, not because of price, but we have, I think, on several occasions turned M. C. A. bands down and put in competitive bands. I think that is a matter of record.

(Testimony of Wayne Dailard)

Q. Tell me the name of one that you turned down?

A. I don't know. I have booked seven or eight hundred bands in the last few years. How can I remember them? How can I be expected to remember? But I do know it has happened.

Q. Of these approximately 700, at least 90 per cent of them were M. C. A. bands, weren't they?

A. That I don't know. That is a job for a statistician.

Q. In any event, you use the best bands that are available at all times?

A. Regardless of whose agency it came from, we used the best attractions we could buy, regardless of the agency. Our record of operation will prove that. Our record of operation will also prove that in many cases, as I have stated before, we have taken M. C. A. bands out and put in competitive bands because they were stronger attractions.

Q. What I am getting at, and all I asked you was, that you use the very best bands available at all times?

A. That was our policy.

Q. And the biggest name bands that you could get?

A. That is right.

Q. And that was true at the Fair as well as at the [473] Square, wasn't it?

A. Our policy—no. Our policy at the Fair was big attractions, whether they were bands or what they were.

Q. Well, but when you used bands?

A. The best available, yes.

Q. You find that that is necessary in order to successfully operate?

A. I would not say that, sir.

(Testimony of Wayne Dailard)

Q. This man, Emil Klicka, one of the men you say prevailed upon you to take over the Fair—

A. Yes.

Q. —you later took him in as a partner, didn't you?

A. Yes. He came up for re——

Q. I only asked you if you did. A. Yes.

Q. Now, you say that you had never met Mr. Stein before the trial commenced here?

A. That is correct.

Q. You are sure of that?

A. Well, certainly, or I wouldn't state it.

Q. On the other hand, you would call Mr. Bishop at least once or twice a week, wouldn't you?

A. Yes.

Q. By telephone? A. Yes. [474]

Q. And by personal visits?

A. Well, certainly. In the conduct of our business it was necessary.

Q. And you gave him gratuities, did you not?

A. I give him the Fruit of the Month Club, which cost about \$20.00 a year.

Q. What else did you give him?

A. Nothing else.

Q. Now, one thing more: You told us that your attorney and secretary prepared the bid that was submitted to the City Council?

A. That is correct.

Q. Did those same two people prepare those ads which say, "Do not be confused." 90 per cent of all name bands will appear at—

A. No. Understand, this bid was prepared from notes that I gave them.

(Testimony of Wayne Dailard)

Q. Oh, I see.

A. Frankly, I did not read it.

Q. I see.

A. When it was offered, I asked them to amplify it. That has been a policy. It is part of Pacific Square that 90 per cent. If you want all the evidence, we will try and get you three or four years' newspapers.

Q. I just asked you a simple question, Mr. Dailard. [475] A. All right.

Mr. Doherty: Let the record show that the witness is referring to Plaintiff's Exhibit 7 when he says, "This is the policy."

The Court: Yes; that is what he was referring to.

Mr. Christensen: That is correct, sir.

Q. You say that you have advertised continuously since 1941, at least in the San Diego newspapers, that Pacific Square is the home of M. C. A. bands?

A. I did not say that.

Q. Is that the motto? I may have misquoted that.

A. "90 per cent of name bands."

Q. You say you did advertise that?

A. I did not say that.

Q. What is the situation?

A. I said that we had advertised it. Since we do not use institutional advertising 52 weeks a year, those types of ads have appeared several times during the year, to impress upon the public the quality of the efforts; that

(Testimony of Wayne Dailard)

we were bringing our M. C. A. slogan into it, exactly the same as if you were selling Florsheim shoes you would put a sign out "Forsheim shoes".

Q. Now, you say that you did have such ads during the year 1941?

A. Yes; from the opening of our ballroom. [476]

Q. Do you have a copy of those?

A. Do I have a copy of them?

Q. Yes.

A. I stated a few moments ago, if it would be necessary as evidence, I think I can obtain them from the newspaper files.

Q. Will you do that for me? A. Yes.

Mr. Christensen: Thank you, that is all.

Mr. Doherty: That is all. Mr. Dailard, there is further examination I must make of you, but not at this time, so will you stay under subpoena of the court, please?

The Witness: I beg your pardon, sir?

Mr. Doherty: You will still be available?

The Witness: Yes.

The Court: It is so close to the hour of adjournment, I think that we will adjourn.

Ladies and gentlemen, we will take a recess until two o'clock. Remember the admonition and keep its terms inviolate, and be here at two.

(Whereupon, a recess was taken until 2:00 o'clock p. m. of the same day.) [477]

Los Angeles, California, Friday, February 1, 1946.
2:00 p. m.

The Court: All present. Proceed.

Mr. Doherty: Your Honor, could counsel and I approach the bench a moment?

The Court: Yes, sir.

(Discussion between court and counsel off the record.)

The Court: We will do it at the appropriate time. Proceed, gentlemen.

Mr. Christensen: I think we had concluded, had we not, with Mr. Dailard?

Mr. Doherty: Yes.

Mr. Christensen: I think this might be a good time, then, to read these two exhibits, your Honor, our Exhibit No. 9 and our Exhibit No. 10, if I may.

The Court: Very well.

Mr. Jaffe: Weekend of January 1, 1940—

Mr. Christensen: By the way, may the record show that Mr. Jaffe is now reading from Plaintiff's Exhibit 9, which has to do with the record of the bands playing at Mission Beach and Pacific Square.

Mr. Jaffe: January 1, 1940, Jan Garber, M. C. A. January 5, Jan Garber, M. C. A. On February 2nd, at Mission Beach, Horace Heidt, M. C. A. March 29, Paul Pound, Police Ball.

May 3, at Mission Beach, Benny Goodman, M. C. A. [478]

Weekend of May 10, at Mission Beach, Harry Owens, M. C. A.

Weekend of May 24, at Mission Beach, Jacques Renard, General Amusement Corporation.

(Plaintiff's Exhibit 9)

Weekend of June 7, at Mission Beach, Tony Pastor, General Amusement Corporation.

Weekend of June 21st, Garwood Van, M. C. A.

Weekend of June 28, Sonny Dunham, General Amusement Corporation.

July 4, 5 and 6, Muzzy Marcellino, M. C. A.

July the 12th, at Mission Beach, Johnny Richards and Andrews Sisters, General Amusement Corporation.

July 14th, at Mission Beach, Skinnay Ennis, M. C. A.

The weekend of July 19, John Scott Trotter, General Amusement Corporation, at Mission Beach.

The weekend of July 26, Don Ricardo and Dick Powell, General Amusement Corporation.

August the 2nd, at Mission Beach, Johnny Richards, General Amusement Corporation.

The weekend of August 9th, Wingy Manone, at Mission Beach, General Amusement Corporation.

August 16th, at Mission Beach, Jan Garber, M. C. A.

August 23rd, at Mission Beach, Eddie Duchin, M. C. A.

August 30th, at Mission Beach, Muzzy Marcellino, M. C. A.

September the 6th, at Mission Beach, Freddy Martin, M. C. A.

September the 13th, at Mission Beach, Henry King, M. C. A. [479]

September the 20th, at Mission Beach, Bob Crosby, M. C. A.

September the 27th, at Mission Beach, Orrin Tucker, M. C. A.

October the 4th, at Mission Beach, Horace Heidt, M. C. A.

October the 11th, Sterling Young, M. C. A.

(Plaintiff's Exhibit 9)

October the 18th, Jimmy Joy, M. C. A.

November 1st, Orrin Tucker, M. C. A.

November 8th, Horace Heidt, M. C. A.

December the 13th, Tommy Dorsey, M. C. A.

December the 28th, at Pacific Square, Jan Garber, M. C. A.; at Mission Beach, Derby Show.

December 31st, at Pacific Square, Bob Crosby, M. C. A.; and at the Mission Beach, Derby Show.

In 1941, weekend of January 1st, at Pacific Square, Bob Crosby, M. C. A.; at Mission Beach, Derby Show.

January 5th, at Pacific Square, Bob Crosby, M. C. A.; at Mission Beach, Jan Garber, M. C. A.

January 10, 11 and 12, at Pacific Square, Muzzy Marcellino, G. A. C.; at Mission Beach, Derby Show.

January 17, 18 and 19, at Pacific Square, Jimmie Grier, M. C. A.; at Mission Beach, Derby Show.

January 24th, at Pacific Square, Skinnay Ennis, M. C. A.; nothing at Mission Beach.

Weekend of January 26, at Pacific Square, Henry King, M. C. A.; nothing at Mission Beach. [480]

Weekend of January 31st, and February 1st, 2nd and 3rd, Russ Morgan, M. C. A.; nothing at Mission Beach.

February 8th and 9th, at Pacific Square, Bob Crosby, M. C. A.; nothing at Mission Beach.

February 14, at Pacific Square, Muzzy Marcellino, General Amusement Corporation; nothing at Mission Beach.

February 21, Billy McDonald, M. C. A., at Pacific Square; at Mission Beach, Duke Ellington, William Morris.

February 26, Kay Kyser, M. C. A., at Pacific Square; nothing at Mission Beach.

(Plaintiff's Exhibit 9)

February 28, Jimmie Grier, M. C. A.; nothing at Mission Beach.

March 7, Billy Mills, Pacific Square, M. C. A.; nothing at Mission Beach.

March the 14th, at Pacific Square, Skinnay Ennis, M. C. A.; nothing at Mission Beach.

March the 15th, at Mission Beach, Carl Hoff, M. C. A.; nothing at Pacific Square.

March the 21st, at Pacific Square, the Merry Macs and Boyd Kellar, a local band; nothing at Mission Beach.

March 28, Boyd Kellar, local band; nothing at Mission Beach.

April the 4th, at Pacific Square, Phil Harris, M. C. A.; nothing at Mission Beach.

April 11th, at Pacific Square, Ted Lewis, M. C. A.; nothing [481] at Mission Beach.

April the 18th, at Pacific Square, Boyd Kellar. That is a local band. Mission Beach, Jay Eslick, the Police Ball.

April 25th, at Pacific Square, Johnny Richards and Andrews Sisters, General Amusement Corporation; nothing at Mission Beach.

May 2nd, at Pacific Square, John Scott Trotter, General Amusement Corporation; at Mission Beach, Boyd Kellar, local band.

May 9th, at Pacific Square, Richard Himber, General Amusement Corporation; Mission Beach, Boyd Kellar, local band.

May 14, at Pacific Square, Kay Kyser, M. C. A.; nothing at Mission Beach.

May 17th, at Pacific Square, Phil Harris, M. C. A.; Boyd Kellar, local band, at Mission Beach.

(Plaintiff's Exhibit 9)

May 23rd, at Pacific Square, Jack Teagarden, M. C. A.; Boyd Kellar, local band, at Mission Beach.

May 30th, at Pacific Square, Glen Gray, M. C. A.; Boyd Kellar, local band, at Mission Beach.

June the 6th, Boyd Kellar, local band, at Pacific Square; nothing at Mission Beach.

June 13th, at Pacific Square, Skinnay Ennis, M. C. A.; Boyd Kellar, local band, at Mission Beach.

June 20th, at Pacific Square, Harry Owen, M. C. A.; Boyd [482] Kellar, local band, at Mission Beach.

June 27th, at Pacific Square, Boyd Kellar, local band; nothing at Mission Beach.

July 3rd, 4th and 5th, at Pacific Square, Jack Teagarden, M. C. A.; Boyd Kellar at Mission Beach.

July 11th, at Pacific Square, Larry Kent, M. C. A.; nothing at Mission Beach.

July 13th, at Pacific Square, Dick Jergens, M. C. A.; Boyd Kellar at Mission Beach.

July 18th, at Pacific Square, Abe Lyman, M. C. A.; Boyd Kellar at Mission Beach.

July 25th, at Pacific Square, Abe Lyman, M. C. A.; Boyd Kellar at Mission Beach.

Weekend of August 1st, at Pacific Square, Johnny Richards, G. A. C.; at Mission Beach, Boyd Kellar.

Weekend of August 8, at Pacific Square, Bob Crosby, M. C. A.; nothing at Mission Beach.

August the 15th, at Pacific Square, Hal Grayson, M. C. A.; Boyd Kellar at Mission Beach.

August 22nd, at Pacific Square, Ozzie Nelson, M. C. A.; Boyd Kellar at Mission Beach.

August 29th, at Pacific Square. Ray Noble, M. C. A.; at Mission Beach was Mark Roberts, a local band.

(Plaintiff's Exhibit 9)

September the 5th, at Pacific Square, Hal Grayson, M. C. A.; Mark Roberts at Mission Beach. [483]

September 12th, at Pacific Square, Charles Barnet, M. C. A.; Mark Roberts at Mission Beach.

September 19th, Ted TioRito, M. C. A.; Mark Roberts at Mission Beach.

September 26th, Dick Hargrave at Pacific Square. He is a local band. Nothing at *Pacific* Beach.

October 3rd, at Pacific Square, Ozzie Nelson, M. C. A.; nothing at Mission Beach.

October 11, at Pacific Square, Bob Crosby, M. C. A.; nothing at Mission Beach.

October 18, at Pacific Square, Harry Owens, M. C. A.; nothing at Mission Beach.

October 25, Alvino Rey, M. C. A.; nothing at Mission Beach.

November 1st, at Pacific Square, Gene Krupa, M. C. A.; Mark Roberts at Mission Beach.

November 7th, at Pacific Square, Paul Pendarvis, M. C. A.; nothing at Mission Beach.

November 14th, at Pacific Square, Ted FioRito, M. C. A.; nothing at Mission Beach.

November the 19th, at Pacific Square, George Hamilton, M. C. A.; nothing at Mission Beach.

November the 21st, Freddie Martin, M. C. A., at Pacific Square; nothing at Mission Beach.

November 28th, at Pacific Square, Phil Harris, M. C. A.; nothing at Mission Beach. [484]

November 30th, Ted FioRito, M. C. A., at Pacific Square; nothing at Mission Beach.

December 5th, Skinnay Ennis, M. C. A.; nothing at Mission Beach.

(Plaintiff's Exhibit 9)

December 12th and 13th, Ted Weems, M. C. A.; nothing at Mission Beach.

December 14th, Ted FioRito, M. C. A.; nothing at Mission Beach.

December 19th, Phil Harris, M. C. A.; nothing at Mission Beach.

December 26th, Jan Garber, M. C. A.; nothing at Mission Beach.

In 1942, the weekend of January 1st, Ted FioRito, M. C. A.; nothing at Mission Beach.

January 9th and 10th, Ted FioRito, M. C. A.; nothing at Mission Beach.

January 16, Johnny Richards, M. C. A.; nothing at Mission Beach.

January 23rd, Ted FioRito, M. C. A.; nothing at Mission Beach.

January 30th, Jan Garber, M. C. A.; nothing at Mission Beach.

February 6th, Freddie Slack, William Morris; nothing at Mission Beach.

February 13, Gus Arnheim, M. C. A.; nothing at Mission [485] Beach.

February 20th, Bob Crosby, M. C. A.; nothing at Mission Beach.

February 27th, Paul Pendarvis, M. C. A.; nothing at Mission Beach.

March 6, Bob Crosby, M. C. A.; nothing at Mission Beach.

March the 8th, Tommy Dorsey, M. C. A.; nothing at Mission Beach.

March 13th, Sterling Young, M. C. A.; nothing at Mission Beach.

(Plaintiff's Exhibit 9)

March 20th, Freddie Slack, William Morris; nothing at Mission Beach.

March 27th, Jack Teagarden, M. C. A.; nothing at Mission Beach.

April 3rd, Paul Whiteman, William Morris; nothing at Mission Beach.

April 10, Horace Heidt, M. C. A.; nothing at Mission Beach.

April 17th, Gus Arnheim, M. C. A.; nothing at Mission Beach.

April 24th, Bob Crosby, M. C. A.; nothing at Mission Beach.

May 1, Sammy Kaye, M. C. A.; nothing at Mission Beach.

May 3rd, Bobby Sherwood, M. C. A.; nothing at Mission Beach.

May 8, Ozzie Nelson, M. C. A.; nothing at Mission Beach. [486]

May 9 and 10, Sonny Dunham, General Amusement Corporation; nothing at Mission Beach.

May 15, Bob Crosby, M. C. A.; nothing at Mission Beach.

May 22, Ted FioRito, M. C. A.; nothing at Mission Beach.

May 29th, Phil Harris, M. C. A.; nothing at Mission Beach.

May 31, Jack Teagarden, M. C. A.; nothing at Mission Beach.

June 5, Jan Savitt, M. C. A.; nothing at Mission Beach.

June 12, Jack Teagarden, M. C. A.; Mark Roberts at Mission Beach.

(Plaintiff's Exhibit 9)

June 19, Bob Crosby, M. C. A.; Recorded Music at Mission Beach.

June 26, Jimmie Grier, M. C. A.; Mark Roberts at Mission Beach.

July 3, Harry James, M. C. A.; Recorded Music at Mission Beach.

July 5, Sterling Young, M. C. A.; nothing at Mission Beach.

July 10, Ray Noble, M. C. A.; Bob Wills, Mission Beach.

July 17, Rudolf Friml, M. C. A.; Recorded Music at Mission Beach.

July 22, Les Brown, M. C. A.; nothing at Mission Beach.

July 24, Harry James and Leighton Noble, M. C. A., one night; and at Mission Beach, Leighton Noble of M. C. A. was there.

July 30th, Matty Malneck, M. C. A.; nothing at Mission Beach. [487]

August 7th, Billy Mills, M. C. A.; Recorded Music at Mission Beach.

August 14th, Ina Ray Hutton, M. C. A.; Recorded Music at Mission Beach.

August 21, Benny Goodman, M. C. A.; Records at Mission Beach.

August 28, Abe Lyman, M. C. A.; Records at Mission Beach.

September 4th, Rudolf Friml, M. C. A.; nothing at Mission Beach.

September 11, Bob Crosby, M. C. A.; nothing at Mission Beach.

(Plaintiff's Exhibit 9)

September the 14th to 16th, Ina Rae Hutton, Frederick Brothers; nothing at Mission Beach.

September 18, Jimmy Grier, M. C. A.; nothing at Mission Beach.

September 25th, Ray McKinney, William—I guess that is William Morris; nothing at Mission Beach.

October the 2nd, Hal Grayson, M. C. A.; Eddie Lane, local, at Mission Beach.

October 9th, Ted FioRito, M. C. A.; Eddie Lane at Mission Beach.

October 16, Ina Ray Hutton, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

October 23rd, Bob Chester, M. C. A.; nothing at Mission Beach. [488]

October 30th, Tommy Dorsey, M. C. A.; nothing at Mission Beach.

November 6, Jan Garber, M. C. A.; nothing at Mission Beach.

November 13, George Olsen, M. C. A.; Foreman Phillips, at Mission Beach.

November 20th, Johnny Richards, M. C. A.; nothing at Mission Beach.

November 27th, Ada Leonard, Frederick Brothers; nothing at Mission Beach.

December 4, Horace Heidt, M. C. A.; nothing at Mission Beach.

December 11, Ted FioRito, M. C. A.; nothing at Mission Beach.

December 18, Freddie Slack, William Morris; nothing at Mission Beach.

December 24th, Joe Reichman, M. C. A.; nothing at Mission Beach.

(Plaintiff's Exhibit 9)

The year 1943: Weekend of January 1st, Gene Krupa, M. C. A.; nothing at Mission Beach.

January 8th, Alvino Rey and the King Sisters, M. C. A.; nothing at Mission Beach.

January 10th, Hal Grayson, M. C. A.; nothing at Mission Beach.

January 15, Freddie Slack, William Morris, nothing at [489] Mission Beach.

January 22nd, Leon Mojica, M. C. A.; nothing at Mission Beach.

January 29th, Bob Crosby, M. C. A.; nothing at Mission Beach.

February 5, Hal Grayson, M. C. A.; nothing at Mission Beach.

The Court: Pardon me a moment. How much of that is there?

The Witness: We are in the year of 1943, your Honor, and it goes up to 1945.

The Court: Well, proceed.

Mr. Jaffe: February 12th, Johnny Richard, M. C. A.

I believe we can save time, your Honor, if I read those that appeared directly at Pacific Square, and they have not appeared at Mission Beach until I so state.

February 19, Harry Owens, M. C. A.

February 26, Woody Herman, General Amusement Corporation.

March 5, Ted Lewis, M. C. A.

March 12, Horace Heidt, M. C. A.

March 19, Hal Grayson, M. C. A. March 26, Henry King, M. C. A.

April 2, Jan Garber, M. C. A. April 9, Tommy Dorsey, M. C. A.

(Plaintiff's Exhibit 9)

April 11, Alvino Rey, M. C. A. April 16, Horace Heidt, M. C. A.

April 23rd, Al Donahue, William Morris.

April 30th, Glen Henry, M. C. A.; and Merle Carlson at [490] Mission Beach.

May 2nd, Alvino Rey, M. C. A., and Merle Carlson at Mission Beach.

May 8, Glen Henry, M. C. A., and Merle Carlson at Mission Beach.

May 14, Woody Herman, General Amusement Corporation; Merle Carlson at Mission Beach.

May 21, Jan Garber, M. C. A.; Merle Carlson at Mission Beach.

May 28, Eddie Miller, M. C. A.; Merle Carlson at Mission Beach.

June 4, Freddie Slack, M. C. A.; Merle Carlson at Mission Beach.

June 11, Frankie Masters, M. C. A.; Merle Carlson at Mission Beach.

June 18, Alvino Rey, M. C. A.; Merle Carlson at Mission Beach.

June 25, Henry King, M. C. A.; Merle Carlson at Mission Beach.

July 2nd, Ted Lewis, M. C. A.; Merle Carlson at Mission Beach.

July 9, Vaughn Monroe, William Morris; Jack Teagarden, M. C. A.; at Mission Beach.

July 16, Louis Prima, M. C. A.; Merle Carlson at Mission Beach. [491]

July 23rd, Jan Garber, M. C. A.; Merle Carlson at Mission Beach.

(Plaintiff's Exhibit 9)

July 30, Jan Garber, M. C. A.; Merle Carlson at Mission Beach.

August 5, Ted Lewis, M. C. A.; Merle Carlson at Mission Beach.

August 13, Henry King, M. C. A.; no one at Mission Beach.

August 20, Henry King, M. C. A.; Merle Carlson at Mission Beach.

August 27, Tommy Dorsey, M. C. A.; Merle Carlson at Mission Beach.

September 3rd, Charlie Spivak, M. C. A.; Merle Carlson at Mission Beach.

September 10, Louis Prima, M. C. A.; Merle Carlson at Mission Beach.

September 17th, Louis Prima, M. C. A.; Merle Carlson at Mission Beach.

September 24, Freddie Slack, M. C. A.; Merle Carlson at Mission Beach.

October 1, Paul Martin, M. C. A.; Merle Carlson at Mission Beach.

October 8, Jimmy Dorsey, General Amusement Corporation; Merle Carlson at Mission Beach.

October 15, Les Brown, M. C. A.; Merle Carlson at Mission Beach. [492]

October 22, Mitch Ayers and Andrews Sisters, General Amusement Corporation; Merle Carlson at Mission Beach.

October 29, Charlie Spivak, M. C. A., and Spade Cooley, General Amusement Corporation at Mission Beach.

November 5, Bob Crosby, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

November 12, Joe Reichman, M. C. A.; Merle Carlson, at Mission Beach.

(Plaintiff's Exhibit 9)

November 19, Frankie Masters, M. C. A.; Jack Teagarden, M. C. A., at Mission Beach.

November 26, Teddy Powell, M. C. A.; Merle Carlson at Mission Beach.

December 3, Les Brown, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

December 16, Horace Heidt, M. C. A.; Merle Carlson at Mission Beach.

December 17, Les Brown, M. C. A.; Merle Carlson at Mission Beach.

December 24, Paul Martin, M. C. A.; no one indicated at Mission Beach.

December 31, Bob Crosby, M. C. A.; Merle Carlson at Mission Beach.

The year of 1944: January 1, Bob Crosby, M. C. A.; Merle Carlson at Mission Beach.

January 7, Henry Busse, William Morris; Merle Carlson at [493] Mission Beach.

January 14th, Frankie Masters, M. C. A.; Merle Carlson at Mission Beach.

January 21, Alvino Rey, M. C. A.; Merle Carlson at Mission Beach.

January 28, Sammy Kaye, M. C. A.; Bob Nolan at Mission Beach.

February 4, Sammy Kaye, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

February 11, Stan Kenton, General Amusement Corporation; Merle Carlson at Mission Beach.

February 18, Woody Herman, General Amusement Corporation; Spade Cooley, General Amusement Corporation, at Mission Beach.

(Plaintiff's Exhibit 9)

February 25, Paul Martin, M. C. A.; Merle Carlson at Mission Beach.

March 3, Jack Teagarden, M. C. A.; Merle Carlson at Mission Beach.

March 10, Kenny Baker, M. C. A.; Spade Cooley, General Amusement Corporation, at Mission Beach.

March 17, Hal McIntyre, William Morris; Spade Cooley, General Amusement Corporation, at Mission Beach.

March 24, Sammy Kaye, M. C. A.; Spade Cooley, General Amusement Corporation, at Mission Beach.

March 31, Stan Kenton, General Amusement Corporation; [494] Spade Cooley, General Amusement Corporation, at Mission Beach.

April 7, Jack Teagarden, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

April 14, Jimmy Dorsey, General Amusement Corporation; Spade Cooley, General Amusement Corporation, at Mission Beach.

April 21, Johnny Richards, M. C. A.; Spade Cooley, General Amusement Corporation, at Mission Beach.

April 28, Ina Rae Hutton, Frederick Brothers; Spade Cooley, General Amusement Corporation, at Mission Beach.

May 5, Charlie Barnet, M. C. A.; Spade Cooley, General Amusement Corporation, at Mission Beach.

May 12, Charlie Barnet, M. C. A.; Bob Wills, M. C. A., Mission Beach.

May 19, Hal McIntyre, William Morris; Spade Cooley, General Amusement Corporation, at Mission Beach.

May 26, Al Donahue, William Morris; Spade Cooley, General Amusement Corporation, at Mission Beach.

(Plaintiff's Exhibit 9)

June 2nd, Henry King, M. C. A.; Spade Cooley, General Amusement Corporation, at Mission Beach.

June 9, Horace Heidt, M. C. A.; Spade Cooley, General Amusement Corporation, at Mission Beach.

June 16, Jan Garber, M. C. A.; Ray Whitley at Mission Beach.

June 23rd, Jan Garber, M. C. A.; Bob Wills, M. C. A., at [495] Mission Beach.

June 30, Charlie Barnet, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

July 7, Charlie Barnet, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

July 14, Ted Weems, M. C. A.; Ray Whitley, at Mission Beach.

July 17th, Ted Weems, M. C. A.; no one indicated for Mission Beach.

July 21, Ted Weems, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

July 28, Jack Teagarden, M. C. A.; Ray Whitley at Mission Beach.

August 4, Charlie Barnet, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

August 11, Joe Reichman, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

August 18, Jimmy Dorsey, General Amusement Corporation; Bob Wills, M. C. A. at Mission Beach.

August 25, Jimmy Dorsey, General Amusement Corporation; Bob Willis, M. C. A., at Mission Beach.

September 1, Jan Garber, M. C. A.; no one indicated at Mission Beach.

September 8, Ted Lewis, M. C. A.

(Plaintiff's Exhibit 9)

September 15, Joe Reichman, M. C. A.; Freddie Martin, [496] M. C. A., at Mission Beach.

September 22, Jan Garber, M. C. A.

September 29, Harry James, M. C. A.

October 6, Harry James, M. C. A.

October 13, Al Donahue, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

October 20, Frankie Masters, M. C. A.; Spike Jones, General Amusement Corporation, at Mission Beach.

October 27, Freddy Martin, M. C. A.

November 3, Tommy Dorsey, M. C. A.; Bob Wills, M. C. A., at Mission Beach.

November 8, Leighton Noble, M. C. A.; and no one indicated at Mission Beach.

November 10, Tommy Dorsey, M. C. A.; and Bob Wills, M. C. A., at Mission Beach.

November 17, Freddy Martin, M. C. A.; Spike Jones, General Amusement Corporation, at Mission Beach.

November 24, Artie Shaw, William Morris; and Stan Kenton, General Amusement Corporation, at Mission Beach.

December 1, Bobby Sherwood, M. C. A.

December 8, Woody Herman, General Amusement Corporation.

December 15, Harry James, M. C. A.

December 22nd, Jan Garber, M. C. A.

December 29, Charlie Barnet, M. C. A.; Harry Owens, M. C. A., at Mission Beach. [497]

1945, Finley starts.

January 1, Charlie Barnet, M. C. A. Nothing at Mission Beach.

(Plaintiff's Exhibit 9)

January 5, Stan Kenton, G. A. C. Nothing at Mission Beach.

January 12th, Jan Garber, M. C. A.; nothing at Mission Beach.

January 19th, Charlie Barnet, M. C. A.; nothing at Mission Beach.

January 26, Ted FioRito, M. C. A.; nothing at Mission Beach.

January 30, Bob Wills, M. C. A.; nothing at Mission Beach.

February 2, Vaughn Monroe, William Morris, and King Sisters, M. C. A., at Pacific Square; and Henry Busse, William Morris, at Mission Beach.

February 9th, at Pacific Square, Bob Chester and Jack Teagarden, M. C. A. Tiny Hill, Frederick Brothers, at Mission Beach.

February 6, at Pacific Square, Bob Wills, M. C. A.; and February 13, Bob Wills, M. C. A. Nothing indicated for Mission Beach.

February 16, Ted Lewis, M. C. A.; Wingy Manone, General Amusement Corporation, at Mission Beach.

February 20, Bob Wills, M. C. A.; nothing indicated at [498] Mission Beach.

February 23, Bob Wills, M. C. A., at Pacific Square; Sally Mason, Frederick Brothers, at Mission Beach.

February 27th, at Pacific Square, Bob Wills, M. C. A.; nothing at Mission Beach.

March 2, at Pacific Square, Gene Krupa, M. C. A.; Ansil Hill, General Amusement Corporation, at Mission Beach.

(Plaintiff's Exhibit 9)

March 6, Merle Lindsey, and nothing indicated of the agency, at Pacific Square; and no one indicated at Mission Beach.

March 9th, Eddie Oliver, Abbott & Costello, M. C. A.; and Ada Leonard, Frederick Brothers, at Mission Beach.

March 13, at Pacific Square, Bob Wills, M. C. A.; and nothing indicated for Mission Beach.

March 16, Jack Teagarden, M. C. A.; Ansil Hill, General Amusement Corporation, at Mission Beach.

March 20, Bob Wills, M. C. A.; nothing indicated for Mission Beach.

March 23rd, Artie Shaw, William Morris; and Shorty Sherock, General Amusement Corporation, at Mission Beach.

March 27, Bob Wills, M. C. A., and nothing indicated for Mission Beach.

March 30, Bob Wills—or, Artie Shaw, William Morris; and Shorty Sherock, General Amusement Corporation, at Mission Beach. [499]

On April 3rd, Bob Wills, M. C. A.; nothing indicated for Mission Beach.

April 6th, Artie Shaw, William Morris; and Ansil Hill, General Amusement Corporation, at Mission Beach.

April 13, Ted FioRito, Music Corporation of America; and Muzzy Marcellino, General Amusement Corporation, at Mission Beach.

April 17th, Bob Wills, M. C. A.; nothing indicated for Mission Beach.

April 20th, Charlie Barnet, M. C. A.; and Chris Cross, Frederick Brothers, at Mission Beach.

April 24th, at Pacific Square, Bob Wills, M. C. A.; nothing indicated for Mission Beach.

(Plaintiff's Exhibit 9)

April 27th, Charlie Barnet, M. C. A.; Ansil Hill, General Amusement Corporation, at Mission Beach.

May 1, Bob Wills, M. C. A.; nothing indicated for Mission Beach.

May 4, Al Donahue, M. C. A.; Ansil Hill, General Amusement Corporation, at Mission Beach.

May 11, Jan Garber, M. C. A.; Frankie Carle, General Amusement Corporation, at Mission Beach.

May 15, at Pacific Square, Merle Lindsey. Nothing indicated at Mission Beach.

May 18, Jan Garber, M. C. A.; Frankie Carle, General Amusement Corporation, at Mission Beach. [500]

May 22nd, Eddie Martin. The agency is not indicated, and nothing is indicated for Mission Beach at that time.

May 26, at Pacific Square, Will Osborne, M. C. A.; Frankie Carle, General Amusement Corporation, at Mission Beach.

May 29, Texas Jimmie Lewis is written out here. That was at Pacific Square, and nothing is indicated for Mission Beach.

June 1, 1945, Artie Shaw, William Morris; and Frankie Carle at Mission Beach. Frankie Carle is General Amusement Corporation.

June 6, Tommy Tucker, M. C. A.; Frankie Carle, General Amusement Corporation, at Mission Beach.

June 13, Jack Teagarden, M. C. A.; and at Mission Beach was Tony Pastor of the General Amusement Corporation.

June 18, Jack Teagarden at Pacific Square, M. C. A.; nothing indicated for Mission Beach.

June 22, Charlie Barnet, M. C. A.; Tony Pastor, General Amusement Corporation, at Mission Beach.

(Plaintiff's Exhibit 9)

June 29, at Pacific Square, Artie Shaw, William Morris; and Jimmy Dorsey, General Amusement Corporation, at Mission Beach.

July 3, Jan Garber, M. C. A.; at Mission Beach was Jimmy Dorsey, General Amusement Corporation.

July 3, at Pacific Square is Ted Dophin - Foreman Phillips; nothing indicated for Mission Beach. [501]

There is other handwriting that I can't make out at the moment. Happy Pereyman is listed here in pencil for June 19th at Pacific Square, and June 26, Hank Penny - Foreman Phillips at Pacific Square, with nothing indicated at Mission Beach opposite it.

The Court: How much more of that is there, Mr. Jaffe?

Mr. Jaffe: This is the last page, your Honor.

The Court: Very well.

Mr. Jaffe: July 13, at Pacific Square, Jan Savitt, M. C. A.; at Mission Beach, Jimmy Dorsey, General Amusement Corporation.

July 20, Les Brown, M. C. A., at Pacific Square; Tommy Dorsey, M. C. A., at Mission Beach.

July 27, Tommy Tucker, M. C. A.; Tommy Dorsey, M. C. A., at Mission Beach.

August 3, Charlie Barnet, M. C. A.; was at Pacific Square; and Eddie Miller, M. C. A., at Mission Beach.

August 10, Ray Herbeck, M. C. A., was at Pacific Square; and Glen Gray, of General Amusement Corporation, at Mission Beach.

August 17th, George Auld, Frederick Brothers, was at Pacific Square; Glen Gray, General Amusement Corporation, was at Mission Beach.

(Plaintiff's Exhibit 9)

August 24, Gary Nottingham, M. C. A., was at Pacific Square; Glen Gray, General Amusement Corporation, was at [502] Mission Beach.

August 31, Skinnay Ennis, M. C. A., was at Pacific Square, and Glen Gray, General Amusement Corporation, was at Mission Beach.

September 7, Artie Shaw, M. C. A., was at Pacific Square; and Pinky Tomlin, Frederick Brothers, was at Mission Beach.

September 14, Jan Savitt, M. C. A., was at Pacific Square; and Pinky Tomlin, Frederick Brothers, was at Mission Beach.

September 21, Bobby Sherwood, M. C. A., was at Pacific Square, and Boyd Raeburn, William Morris, was at Mission Beach.

September 28, Skinnay Ennis, M. C. A., was at Pacific Square, and Boyd Raeburn, William Morris, was at Mission Beach.

October 2, Bob Wills, of M. C. A., was at Pacific Square. Nothing is indicated for Mission Beach.

October 5, Harry James, M. C. A., at Pacific Square, and David Willis was at Mission Beach.

October 12, Xavier Cugat was at Pacific Square, and David Willis was at Mission Beach.

October 19, Xavier Cugat was at Pacific Square, and David Willis was at Mission Beach.

October 26, Bobby Sherwood, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

November 2, Joe Reichman, M. C. A., was at Pacific Square, and David Willis was at Mission Beach. [503]

November 9, Harry James, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

(Plaintiff's Exhibit 9)

November 16, Bob Crosby, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

November 23, Joy Cayler, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

November 30, Jan Garber, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

December 7, Skinnay Ennis, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

December 10, Bob Wills, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

December 14th, Joe Reichman, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

December 21, Carmen Cavallero, M. C. A., was at Pacific Square, and David Willis was at Mission Beach.

December 28, Bob Crosby, M. C. A., was at Pacific Square; Charlie Barnet, M. C. A., was at Mission Beach. [504]

The Court: This other agreement that you suggested be read now, if it is a little long, I think we had better have a witness on the stand.

Mr. Christensen: Let me call Mr. Jules Stein for cross-examination.

Mr. Doherty, may we have it understood that when we use the initials or when the initials "M. C. A." have been used they refer to Music Corporation of America?

Mr. Doherty: Yes. I think everybody understands that. So stipulated.

The Court: It is so understood.

JULES STEIN,

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. Christensen:

The Clerk: State your name.

The Witness: Jules Stein.

Q. By Mr. Christensen: Mr. Stein, your business, occupation or profession, sir, is what?

A. President of Music Corporation of America.

Q. And the business of Music Corporation of America is what?

A. Representing orchestras.

Q. You also are connected with other forms of the enter- [505] tainment business, are you not, sir?

A. Yes.

Q. Will you tell us what they are?

A. President of several other companies that represent talent in various branches of the amusement business.

Q. Well, for example, you are also the president of M. C. A. Artists, Ltd., are you not, sir? A. Yes.

Q. What is the business of M. C. A. Artists, Ltd.?

A. Representing artists in the amusement business.

Q. What are the other ones, sir?

A. There is Management Corporation of America.

Q. And the business or occupation of Management Corporation of America is what?

A. A New York corporation, primarily representing radio artists.

Q. You are the president of that organization, too, are you not, sir? A. Yes.

Q. And you are also the president of California Movie Company, Inc., are you not, sir? A. Yes.

(Testimony of Jules Stein)

Q. What is the business of that organization, sir?

A. That also represents a few radio artists.

Q. All in all, there are four other affiliates of Music [506] Corporation of America, are there not, sir?

A. Approximately.

Q. Well, what is the exact number, sir?

A. Well, I don't know offhand but it would be four or five, perhaps.

Q. And you are the president of all of those?

A. I believe all except one or two.

Q. What are those?

A. There may be some small corporation that is primarily interested in some real estate, which I may not be. I am not sure at the present moment.

Q. The directors of all of those organizations are the same, are they not, sir?

A. Primarily the same.

Q. And the business of Music Corporation of America is divided, is it not, into a number of different offices?

A. Music Corporation of America has offices in various cities.

Q. Will you tell us which cities?

A. They have offices in New York, Chicago, Beverly Hills, Cleveland, Detroit, Dallas, and San Francisco.

Q. That is to say, there are seven offices of Music Corporation of America at this time? A. Right.

Q. Prior to the war, there were offices in foreign [507] countries, too, sir?

A. We had an office in London, England, only. However, that was not Music Corporation of America.

Q. And you have other offices in the United States?

A. We had an office in Atlanta which we closed.

(Testimony of Jules Stein)

Q. And the Music Corporation of America is a corporation, is it not? A. It is.

Q. Organized under the laws of Delaware?

A. It is.

Q. Does it have a principal place of business?

A. It has no principal place of business.

Q. Then, the business is conducted through and by means of the seven offices that you have named?

A. Right.

Q. Does any one of those offices cover the entire United States, or do each of the offices have separate territory of its own?

A. They have a jurisdiction. Some of them are interlocked.

Q. Can you explain?

A. The United States is divided into several sections or jurisdictions, and the dividing lines are not particularly sharp, as, for example, we might find our office in Cleveland handling certain accounts in Pittsburgh simultaneously with [508] our New York office; and similar examples would appear wherever the jurisdictions meet.

Q. The business of Music Corporation of America is in the representation of orchestras and musicians in all branches of the amusement industry? is it not?

The Witness: Will you repeat, that, please?

(Question read by the reporter.)

A. Not exactly.

Q. Do you wish to explain?

A. We are representatives, counsellors, advisers, and agents to orchestras, primarily the leaders. Our contact with the individual musicians is practically nil.

(Testimony of Jules Stein)

Q. But you do represent the musicians and the orchestras as a whole, do you not, sir?

A. Well, it is a question as to who is the employer, the leader or the place of performance.

Q. You receive commission on the amount of money paid to and for the use of the entire orchestra, do you not, sir?

A. Right.

Q. And you are required to show the name of the musicians which are appearing on your contract?

A. Right.

Q. A moment ago you told us about the various offices. Can you tell me—I think you used the word “jurisdiction”, so let me use that. Can you tell me the jurisdiction of the [509] Beverly Hills office?

A. Well, it essentially goes as far East as the Rockies, down through, perhaps, El Paso, covering the Coast states to the north, and everything west of that line.

Q. This office, then, handles the booking with the ballroom operators throughout the area you have just described, does it not, sir?

A. Either this office or the San Francisco office.

Q. Does the San Francisco office have concurrent jurisdiction with this office? When I say “this office” I am referring to the Beverly Hills office.

A. It is in reality a branch of the Beverly Hills office.

Q. Will you take, for example, an orchestra which you represent, being in Chicago and desirous of playing throughout the West and Middlewest and Northern states, and tell us how that is handled?

A. Well, if an orchestra desires to come west and play engagements in this community, if, through our best knowledge and advice it is advisable that they come into

(Testimony of Jules Stein)

this territory, contact is made with the leader of the orchestra involved.

Q. Tell me how you would do that, sir?

A. That would either be by personal contact, telephone, wire or correspondence, or perhaps by contact with some other office who might contact the leader in that way. [510]

Q. Then, for example, if the orchestra was in Chicago, then you would phone, or telephone, probably, would you not, your Chicago office and ask the personnel there or one of the members of that office to contact the leader of the orchestra at Chicago and get certain information?

A. It is usually done in consultation with the other office wherever the orchestra might be.

Q. In other words, the business of the Music Corporation of America is so set up that it covers the entire United States? A. Yes.

Q. And it would depend upon the jurisdiction of the particular office as to which office would handle the business? A. Right.

Q. Now, if a band were in New York City and it was coming clear to the West Coast, how many of your offices would handle that?

A. Well, sometimes it is handled directly with the orchestra leader. If it were for an engagement in this territory, it might be handled directly from here to the leader.

Q. In other words, from Beverly Hills you would contact the leader, then, in New York, and make the

(Testimony of Jules Stein)

arrangements by way of—oh, letter or telephone or wire, for the trip west? [511]

A. Usually with the knowledge of the other offices or the primary office which may be involved at that time in also wanting the attraction of the orchestra for its place.

Q. Now, tell me how do you do that? How is that done, sir?

A. Your question has to be more specific on just what you—

Q. Well, you said you advised the other offices.

A. They will either know by previous phone calls or correspondence that an orchestra is wanted or desired in this community; and then they will consult with the orchestra leader, advising him of the various engagements that might be available for him throughout the United States. He will then be given our advice and counsel and he will then make a decision on what he would like to do best and which, perhaps, is the most remunerative or beneficial to his career.

Q. Which office would handle the contracts for that trip, or would it be handled by several offices?

A. Well, it would depend upon where the engagement is to be performed. If it were to be performed in this jurisdiction, undoubtedly and unquestionably this office here in Beverly Hills would handle it.

Q. Then, let me see; Denver would be in the jurisdiction of the Beverly Hills office?

A. It might be in the Chicago jurisdiction. [512]

(Testimony of Jules Stein)

Q. Denver would be Chicago?

A. There is a dividing line. ' That is one of the towns, I think, that is handled by both offices.

Q. So that either Chicago or Beverly Hills offices would handle Denver, is that right?

A. That is right.

Q. Then, let us come a little farther west and take Salt Lake City. The Los Angeles office would prepare the contracts with that ballroom operator in Salt Lake, sir?

A. Either the Beverly Hills office or the San Francisco office.

Q. And they would mail the contract to the ballroom operator there in Salt Lake City for execution?

A. Right.

Q. And the ballroom operator in Salt Lake would return it then to your Beverly Hills office?

A. Right.

Q. And then you would forward it to the band leader?

A. Well, just which comes first I am not certain, but I am of the opinion that the negotiations are made with the employer, after discussion with the orchestra leader, and contracts are then mailed, they are returned to this office and then sent to the leader of the orchestra to sign, returned to this office, and then returned to the employer with the copy for filing with the local Federation of Musicians' office [513] in the city where the engagement is performed.

(Testimony of Jules Stein)

Q. And the remittances, are they handled by telegraph or mail?

A. That depends on the type of engagement upon which the orchestra performs.

Q. Well, explain to us.

A. If it is a single engagement, as we call "one-nighters" in the parlance of our business, as a rule, a deposit is required of the promoter or the employer who desires to put on the dance. Deposits are eliminated from certain types of employers with whom we have done business for a long time, because the American Federation of Musicians holds us responsible for failure of the leader to be compensated for his services, as well as those of the orchestra.

Q. The American Federation of Musicians—

A. The American Federation of Musicians holds the agent responsible.

Q. In other words, in this case it would be the Music Corporation of America or you, personally?

A. Everything due to care and diligence must be carried out in the securing of engagements. With regard to permanent engagements, that is, an engagement of an orchestra for one week or longer, as a rule, deposits are not required, because they are usually employers who have been in that business for [514] a substantial period of time. However, in many cases, as, for instance, engagements in Florida, which are seasonal engagements or engagements of a seasonal type, very often have their engagements for a week or longer and substantial deposits are required.

(Testimony of Jules Stein)

Q. Those are sent by wire, are they not? Time is very important?

A. They are usually sent by mail, because time is an essence in doing proper bookings. However, our contracts, it is their desire to be booked consecutively, constantly, and with due credit to themselves.

Q. From what you have told me, it appears that your offices act in cooperation with each other; that is to say, the Beverly Hills office in cooperation with all of the other six and the other six vice versa, is that right?

A. They cooperate to the best of their ability.

Q. And you keep your offices apprised, one as to what the others are doing, is that right?

A. As best as possible.

Q. Is the credit for the bookings given to one office or is it to the corporation in general?

A. It is given to the corporation in general.

Q. Well, where is that office, that is, the office of the corporation in the sense that you have now just used it?

A. Our accounting, if you refer to that, is done in our [515] New York offices.

Q. So then, if your Beverly Hills office received remittances, those funds are transferred to your New York office?

A. No; they are kept here. Accounting returns or accounting reports are sent for consolidation to our New York offices. It is really not our own New York office; it is sent to an accounting firm in New York.

Q. In order to handle these series of one-nighters someone prepares an itinerary; that is true, is it?

A. Right.

(Testimony of Jules Stein)

Q. Will you tell me who does that?

A. That is usually prepared in the office where the orchestra is or in whose jurisdiction the orchestra is appearing.

Q. Well, it is prepared by the M.C.A.?

A. It is prepared by an employee of our company; yes.

Q. Mr. Stein, when I use the word "band" and the word "orchestra" I am using them synonymously. Are they, so far as you know, synonymous? I want to be correct.

A. Well, truthfully, the nomenclature is entirely different. A band is an instrumental group of brass instruments. An orchestra is primarily one of a combination of instruments, including string as well as reed and brass instruments and percussion. [516]

The word "band" has been introduced in reference to such orchestras as we have known as the jazz bands, and the words became rather synonymous over the last period of—oh, ten years, perhaps, maybe longer. There have been numerous controversies on it because of different laws under the American Federation of Musicians applying to bands and different ones applying to orchestras; and therefore confusion has arisen, when they look at various interpretations of the laws, which is bands and which is orchestras, when in reality they are orchestras.

Q. If I use the term "orchestra" will you understand that I am not attempting to differentiate, but include both? A. Right.

(Testimony of Jules Stein)

Q. Thank you, sir. So that the itinerary for the orchestra, then, is prepared by the office that originates the booking, is that right? A. Correct.

Q. For instance, if your Beverly Hills office is bringing somebody from New York, wouldn't your Beverly Hills office prepare the itinerary?

A. Only for their jurisdiction.

Q. Just from when it gets into that portion of the country west of the Rockies; is that true? A. Right.

Q. And that, I believe you have told me, is done by [517] mail, telegram, telephone, and in some cases by personal contact? A. It could be.

Q. Your representatives do call upon the ballroom operators, do they not, sir? A. Yes, they do.

Q. And do keep in touch with the orchestra while it is en route, shall I say, en route filling its engagements?

A. I think so.

Q. And counsel and advise with them under such circumstances? A. Correct.

Q. And keep track of what they are doing, how they are doing in the particular engagements?

A. Correct.

Q. The Music Corporation of America represents a large number of bands, does it not, sir?

A. A substantial number of bands.

Q. Do you know the number, sir?

A. Only approximate, perhaps.

Q. Would you tell me?

A. I would say in the neighborhood of 200.

Q. Oh, yes. If the Beverly Hills office were to make an engagement for a particular orchestra to play at a particular ballroom on a particular date, your Beverly

(Testimony of Jules Stein)

Hills office [518] would then at that time promptly, at least, notify all other offices of that fact?

A. Not necessarily so.

Q. Would you explain?

A. If an orchestra is allocated to this district or has agreed to stay in this jurisdiction for a reasonable length of time, unless there are demands from other offices for the orchestra, it would be unnecessary to keep the other offices completely advised of each and every detail of their engagement.

However, I believe they have sufficient knowledge of other engagements in the territory so as to be helpful to them in any negotiations they may have with people in their jurisdiction.

Q. Could you help us by telling us how and in what manner that these allocations that you just spoke of are made?

A. Purely at the desire of the orchestra leader. We counsel and advise him and recommend various types of engagements throughout the country. He has the privilege of deciding on what he would like to have done and where he would like to perform, providing we can secure those engagements for him; and then we, to the best of our ability, carry out his desires.

Q. Well, isn't it true, though, that you counsel with [519] the various orchestras and advise as to where, in your judgment—when I say “yours”, whoever you may have delegated the duty to—in your judgment the orchestras should play?

A. That is what they engage us for, for our counsel and advice.

(Testimony of Jules Stein)

Q. Yes, sir. And generally speaking, that is followed, is it not, sir? A. No; not necessarily so.

Q. But even if an orchestra were to accept a direct booking, they would nevertheless be required to pay you the regular commission on that engagement; is that not true? A. That is true.

Q. The dollar volume of business done by Music Corporation of America is approximately \$15,000,000 per year, is that right? A. Correct.

Q. Now, with reference to this direct booking: Sammy Kaye is one of the orchestras represented by you?

A. Yes.

Q. He is now in New York? A. Right.

Q. Suppose a ballroom operator here desired to make a direct booking with Sammy Kaye; how would that be handled?

A. Well, if the employer wished to contact the orchestra leader direct, it is perfectly agreeable. [520]

Q. Would you require that your company prepare the contracts?

A. That is the usual custom in the business and is required by the American Federation of Musicians.

Q. You do insist upon that, don't you?

A. Only by our obligations to the orchestra and to the American Federation of Musicians.

Q. I mean, but you do insist upon that, don't you?

Mr. Doherty: I think the question has been asked and answered, your Honor. He said he must, because of the regulations of the American Federation of Musicians.

The Court: Wasn't that the same question repeated? I thought he had answered.

(Testimony of Jules Stein)

Mr. Christensen: He just said he must. I wondered if he did, even though he must.

A. Well, it is a custom and a requirement. We have no alternative.

Q. You know Mr. Finley, don't you, sir?

A. I have met him.

Q. That is all; just have met him?

A. That is about all.

Q. At least some of these affiliate organizations represent attractions as we have here distinguished them from orchestras; that is right, isn't it?

A. Well, everything in the amusement business, as we [521] sell it, is an attraction. Attractions are divided into their various categories: Artists, orchestras, motion pictures, and other types of amusement. Everything is an attraction.

Q. All right. Then, using that definition, one of the affiliate organizations represents artists?

A. Correct.

Q. I believe you told me that there is one of the affiliates that represents only motion picture artists, isn't it?

A. Primarily motion pictures.

Q. And that there is one of your affiliates represents, primarily at least, radio artists, is that correct?

A. Right.

Q. And then there is one of your affiliates that represents artists, generally, is that true?

A. Well, there is no sharp demarcation. It is more by the rules of the various unions and guilds that require licensing in order to represent their artists or their members.

(Testimony of Jules Stein)

Q. Now, when a booking is available, say, for an orchestra, then you also try to book into that spot an artist that you represent, too, don't you?

A. Occasionally.

Q. Well, as often as you can, don't you?

A. Yes, if they are desired by the places of perform- [522] ance.

Q. You have seen that letter there or that contract with Mr. Dailard, haven't you? A. Yes.

Q. It is in evidence there. That signature which appears to be "Jules Stein" with the title "Pres." of president? A. Right.

Q. That is your signature, isn't it? A. It is.

Mr. Christensen: That is all I wanted. Thank you very much, Mr. Stein. You may examine, counsel.

Mr. Doherty: My rule, your Honor, when I have my own client, I cross-examine not at all, because I think it is better to put him on in due order. But I think, for the purpose of the jury, there ought to be just one or two questions asked.

Cross-Examination

By Mr. Doherty:

Q. Mr. Stein, in answer to one question, you said it depends upon whether or not the leader is the employer or the musicians. Now, there is some conflict, is there not, between the construction given that position by the American Federation of Musicians and the Internal Revenue Department?

A. That is correct. There is a controversy which has [523] existed for some ten years with the—

(Testimony of Jules Stein)

Q. The Musicians—pardon me. Go ahead.

A. —with the advent of Social Security, as to who is the employer. The American Federation of Musicians has endeavored by what they call a form B contract to maintain that the position of the performances, as, for example, Mr. Dailard or Mr. Finley is the employer, and many of the employers, and the Government has held, up to date, that in reality the leader of the orchestra is the employer. There has been a large confusion that has not been decided to date. I think it is now up in the Circuit Federal Court of St. Louis to be decided, or at least another decision to be rendered within the next few weeks.

Q. In other words, the Musicians' Union want, like the Biltmore Hotel, to be deemed the employer?

A. Right.

Q. Of the entire band? A. Right.

Q. And the Internal Revenue Department wants the band leader to be known as the employer of his musicians, and the hotel or place of amusement a sort of independent contractor with the band leader?

A. Well, no. Originally, the Treasury Department wanted the leader to be the employer. Then they reversed themselves, after consultation with the American Federation of [521] Musicians. But the courts to date have held that the leader is still the employer. So there is a conflict between the Treasury Department and the courts which has not yet been carried sufficiently high to make the final determination.

Q. Now, you state there are approximately 200 bands represented by the Music Corporation of America. How many bands are there in the United States?

A. I would say approximately a thousand.

(Testimony of Jules Stein)

Q. That is what you would call so-called name bands?

A. Yes, name bands in my interpretation.

Q. What is your interpretation of the name band, Mr. Stein?

Mr. Christensen: To which we object as not being proper examination.

The Court: Well, I think it is. I think it is. You asked him how many bands they controlled.

Mr. Christensen: Yes, I did.

The Court: And they have a right to expatiate on that on cross examination. Do you press the question, Major?

Mr. Doherty: Yes. I was just going to make a suggestion. Your Honor used the words "that they controlled". They merely act as employment agents for.

The Court: I was not using the word advisedly. Do you want him to answer that question?

Mr. Doherty: Yes. [525]

The Court: The objection is overruled.

Q. By Mr. Doherty: Mr. Stein, we have had numerous witnesses here, now, tell us what is and what is not a name band. Will you now try to give your interpretation or construction or definition of it?

A. My simplest interpretation of a name band is any number of musicians to which a name is ascribed; and then it is a question of relative value of those name bands from the simplest one to the largest attraction of its kind in the business.

Q. And what name is ascribed to it?

A. The name of the leader itself in practically all cases.

(Testimony of Jules Stein)

Q. Are there any exceptions to that?

A. There are a few exceptions where names are used in conjunction with descriptive places or descriptive terms, as, for instance, the Casa Loma Orchestra is one to which another name was added, the name of the leader, Glen Gray. In my opinion, there is no demarcation or beginning or end of what is a name band.

Q. And there is no certain definition; and it is your opinion that the name of the leader is what determines whether it is or is not a name band? A. Correct.

Q. How long have you had to observe the development of [526] that in the United States; over what period of time? A. Since 1915.

Q. How did that start out? Were those the days before radio?

A. Radio was not in existence at that time and name bands, or what we would refer to as a name band, would be any aggregation of musicians that possibly traveled from one community to another or developed any following whatsoever in its own community.

I, myself, considered myself a name orchestra when I had 7 musicians and went from Chicago to Kansas City in 1916; and I was advertised as such in Kansas City. There was no radio. I had made no records. But, to the people in Kansas City, I at least thought, and the business justified the hotel advertising me as a name orchestra.

Various changes have happened in the business over many years, in which radios have increased the popularity of orchestras for records, and for many other things.

There is no way of telling as to what is going to be what we call a popular name orchestra. There are no

(Testimony of Jules Stein)

ingredients you can put together, whether it be instrumentality of music or any other thing that can tell you in advance. It is a question of popular taste and popular approval. The public is the one that makes the answer and pays off at the boxoffice.

Q. Is the case of popularity of the public constant or [527] fluctuating?

A. It is very fluctuating and very volatile. What is taste today and what is popular today may not be tomorrow. They have gone through various cycles from swing bands, sweet bands, symphonic bands, jazz bands. It has been a cycle that has been running as long as I remember.

Q. Can you give the names of some other bands in the earlier days besides the Jules Stein orchestra or band? I mean, take into the '20's where it began to develop more?

A. Out here in California they had a band by the name of Art Hickman, who was only known in this community. He was not known throughout the country, but he was considered a great name band here. The Abe Lyman was originally from out in this territory. Each city had attractions, or bands, I should say, with local popularity, which, of course, with the advent of radio and records managed to popularize these attractions from coast to coast or internationally.

The Court: I think we will suspend now, gentlemen.

We will take our recess, ladies and gentlemen, for a few minutes. Remember the admonition and keep its terms inviolate, and occupy the jury room.

(Short recess.)

The Court: All present. Proceed.

(Testimony of Jules Stein)

Q. By Mr. Doherty: Mr. Stein, just as we recessed you were telling us about Art Hickman and Abe Lyman, etc. And I [528] had also asked you the question about the constancy of the public's affection. Do you know of any instances in recent years where bands are very popular for a period and then suddenly lost attraction to the public?

A. That is not uncommon, and perhaps there are lists of orchestras throughout the whole United States who have risen in popularity and have achieved a big success, and then either declined gradually or sometimes very quickly. There is an adage that the faster they go up, the quicker they come down. However, that does not hold at all times in the amusement business.

Gus Arnheim, for instance, a local popular attraction many years ago, was taken East and he became very popular throughout the United States. He came back here, and he is hardly considered an attraction or a draw, as we say in the business, here in town. But still I notice in the records that he has played San Diego on several occasions and apparently he was a popular attractions in that city.

It is not unusual for orchestras to have great popularity during certain times, and sometimes it drops off, and then by virtue of some radio broadcast or a record or some unusual incident that we can't put our fingers on, they will revive their popularity and go on for many years.

Some orchestras, like Guy Lombardo, perhaps, goes on for many years. They obtain a simplicity of style, and an [529] unusual type of music that others who try to duplicate undoubtedly have not been so successful in doing.

(Testimony of Jules Stein)

Q. What about Ted Fio Rito?

A. Ted Fio Rito is a similar attraction to Gus Arnheim. He developed tremendous popularity throughout the whole United States, and particularly at certain times when he was writing some songs; and then his popularity declined considerably today, to where he is performing in various places and he hasn't got the same name and reputation, perhaps, as he had before.

We have a relative valuation, determined by the public, either locally or nationally or both.

Q. Did you start out to be a musician?

A. I started as a musician, yes.

Q. At what age?

A. I started as a musician when I was about 8 or 9 years of age, to take lessons.

Q. And did you work at it as a living or as an incident to something else?

A. No; I used it as a means, after I grew up, to take me through school, through college—through medical school, of course.

Q. How far did you go through college?

A. I am a graduate of the University of Chicago, Rush Medical College, from which I have a medical degree; a graduate [530] of the University of Vienna; and also a graduate of the Board of Ophthalmology at the Cook County Hospital.

Q. Were you admitted to practice medicine in Illinois?

A. In the State of Illinois.

Q. What degree did you get from Chicago University?

A. M. D.—no, PHB. PHB and a Master's degree.

(Testimony of Jules Stein)

Q. And what degree from Rush Medical?

A. M. D.

Q. I believe, also, you are a member of the American Federation of Musicians?

A. I have been ever since I played professionally; yes.

Mr. Doherty: I don't want to go any further, your Honor. I might be stepping on the limits of proper examination, so I will not ask any more questions.

Mr. Christensen: May I ask you a few, then?

Re-Direct Examination

By Mr. Christensen:

Q. You first started in this business of booking when you started booking fraternity bands for dances around Chicago; that is right, isn't it?

A. Well, when I was a student at the University of Chicago I arranged for a few orchestras to play in some summer resort engagements in the States of Michigan, Indiana and, I believe, Iowa.

Q. And you have been at that since that time? [531]

A. Well, no. I gave up part of the time when I went to school in Europe, but I also worked as a musician when I came back and during my internship.

Q. Now you have developed Music Corporation of America to where it is the largest booking office in America, is that it? A. Well, I believe it is.

Q. And there has been mentioned here that some orchestras have no names, and you gave one or two illustrations. Can you give us some more?

The Witness: Will you repeat that question?

(Question read by the reporter.)

A. Well, I believe I said they were in rare instances.

(Testimony of Jules Stein)

Q. Well, you mentioned the Casa Loma orchestra and I believe you mentioned another one, didn't you?

A. No; that was the leader.

Q. You can think of no other that has no name?

A. Well, yes. Yes; there are Meyer Davis units which are not represented by any leaders of reputation. The name is a commercial entity under which units operate but still use the name "Meyer Davis"; and those are not directed by the leaders.

Q. Well, I read some place about the band called the Honey Trippers (?) or something like that. I don't attempt to give it to you exactly. [532]

A. I would not be familiar with it.

Q. Or there was a Dixieland band?

A. The Dixieland Jazz Band goes back to the '20's.

Q. How long back would be the Pennsylvanians?

A. Waring's Pennsylvanians are headed by Fred Waring. Those are descriptive terms, and sometimes as popular as the name itself.

Q. And there was the Scranton Sirens, wasn't there?

A. Well, you are going back into quite a period. There was a period in the '20's or early '30's when the public were very receptive to any change of name or any type of description; and we went through a cycle at that time in which you could use various names that were trade names.

There were also the Benson orchestras in Chicago which were similar to the Meyer Davis organization in Boston and Philadelphia. Meyer Davis orchestras still continue, even though they are units, under the trade name, and the Benson orchestras are similar, although they have since gone out of business.

(Testimony of Jules Stein)

Q. So, although they would carry the name "Benson Orchestra", there would not be anyone by the name of Benson leading them; would that be the case?

A. Sometimes that would be the name of the leader, a second name of Benson Orchestra, which apparently Mr. Benson tried to maintain for his own use. [533]

Q. Let me use a fictitious name for the purpose of this illustration. Let me say that John Doakes is an individual and he gathers together half a dozen other musicians who could play; is it your testimony, then, that he could sell it to dance or ballroom operators as a name band?

A. Well, it is a question, again, between the law of supply and demand. During these war years, with the shortage of musicians, we have been able to put together many attractions from places of call and depend upon their reliability for a group of musicians with a leader that would have an organization that they could buy and use in their places.

Q. You would not call it a name band, though, would you?

A. Well, it is, again, a question of what you call a name band. Now, where is the dividing line? ,

Q. There has been handed to me a list of places, a partial list of bands, dance bands, represented by M. C. A. You have seen it, of course, Mr. Stein?

Mr. Doherty: Is that the list that we have submitted to you?

Mr. Christensen: That is it; yes, sir.

A. Yes, I presume this is our list.

Q. Are all of the bands or orchestras listed thereon name bands? A. Yes.

(Testimony of Jules Stein)

Q. They are name bands, every one of them? [534]

A. Yes.

Mr. Christensen: All right. May this be marked for our exhibit next in order?

The Clerk: Plaintiff's Exhibit No. 11.

The Court: So ordered.

(The document referred to was marked as Plaintiff's Exhibit No. 11, for identification.)

Mr. Christensen: That is all, thank you.

Mr. Doherty: Just one question, Mr. Stein.

Re-Cross-Examination

By Mr. Doherty:

Q. You stated that you were the largest organization in the United States. You mean in that particular line? There are other agencies in other lines, artists and vaudeville, aren't there?

A. There are many of them.

Q. That are much larger than you?

A. In certain fields; yes.

Q. When you say you are the largest in the United States, that is just in a particular field?

A. In a particular field; yes.

Mr. Doherty: That is all.

Q. By Mr. Christensen: But in bands and orchestras you are, aren't you, the No. 1?

A. We believe we are. [535]

Mr. Christensen: Thank you.

Now, may I have Mr. Jaffe read the bid?

The Court: Yes.

Mr. Christensen: For the record, the exhibit that is now to be read is Plaintiff's Exhibit 8. It is the bid submitted by plaintiff to the City Council.

(Mr. Jaffe read plaintiff's Exhibit 8 in the following words and figures:)

"Bid for Lease of the Mission Beach Amusement Center

"By: Larry Finley

"712 Bank of America Building

"San Diego, California

"October 30, 1944

"Monday

"To the Honorable Mayor,

"City Council, and

"City Manager

"City of San Diego

"California

"Gentlemen:

"I hereby make application for the leasing of the Mission Beach Amusement Center under the terms of your Document Number 350454.

"Attached is my certified check in the amount of \$1,000.00 which I submit as a guarantee that I will sign [536] the contract if my plan is accepted.

"Following are the terms under which I wish to make my bid for the lease.

"1. Agreed as stipulated.

"2. Agreed as stipulated.

"3. Agreed as stipulated.

"4. Agreed as stipulated.

"5. I agreed to the stipulations of paragraph number 5 and wish to add that I will pay the City of San Diego the sum of \$20,000.00 per year, plus 2% of the 'gross receipts' as rental. The dates that payments shall be

(Plaintiff's Exhibit 8)

made, and the definition of the terms 'gross receipts' shall conform to paragraphs 5 and 7 in the Document.

"6. Agreed as stipulated.

"7. Agreed as stipulated.

"8. Agreed as stipulated.

"9. Agreed as stipulated.

"10. Agreed as stipulated.

"11. Agreed as stipulated.

"12. I agree to maintain and operate the picnic area and playground without charge, I also agree to establish a free policy for the use of horseshoes, nets, balls, etc., in the play area, but reserve the right, if the cost becomes unreasonable, to make a charge for [537] portable athletic equipment of a sum not to exceed 25¢ for each one-half hour of use.

"13. The number and character of devices and facilities for amusement purposes will be determined by my ability to enlist legitimate enterprises in establishing their units in the Mission Beach Amusement Center. It is impossible to state in advance the number and character of these facilities and devices inasmuch as a prospective lessee cannot obtain definite commitments from concessionaires until a definite lease with the city has been obtained. When this has been done, I shall personally visit the outstanding parks and carnivals in the country and solicit such recreational devices as will elevate the prevailing standards of the Mission Beach Amusement Center. I definitely pledge that there will be no gambling devices—there will be no immoral girl shows—that only business-like projects will be tolerated, and these must conform to the over-all objective—to establish a municipal recrea-

(Plaintiff's Exhibit 8)

tional park conforming in dignity, honesty, and service with our other public amusement facilities, such as the Municipal Plunge, Park Zoo, and Playgrounds, and conducted on a plan that would be a credit to the extensive developments now being considered for [538] Mission Bay.

"As evidence of my sincerity in connection with this plan I agree to the following ceiling prices on amusements and foodstuffs:

"Hot dogs—not to exceed 10¢.

"Hamburgers—not to exceed 15¢.

"Strict enforcement of OPA prices on all other foodstuffs.

"Soda pop—not to exceed 10¢.

"Milk—not to exceed 10¢.

"Buttermilk—not to exceed 10¢.

"Strict enforcement of OPA prices on all other soft drinks.

"Amusement games—5¢ and 10¢.

"Electric rides—10¢ and 15¢.

"Shooting gallery—25¢.

"14. I agree to provide daily, free of charge to the public, featured acts and special attractions from May 15th to September 15th, inclusive, of each year, for the purpose of creating interest and enjoyment to visitors of the park. I expect to extend this period of time to more days per year, but guarantee the above minimum number of days.

"A friendly and extensive effort will be made to induce organizations, factories, business firms, etc., to hold their picnics and parties at the [539] Amusement Center on the enlarged and improved picnic ground. The picnic

(Plaintiff's Exhibit 8)

ground will be maintained in such a way so that it will encourage large group picnics.

"I agree to establish and properly equip a free playground exclusively for small children with various devices necessary for their pleasure; to maintain and have the area properly supervised by an attendant so that parents, who are not fortunate enough to have household help take care of their children, can enjoy freedom for swimming or other recreation, while their children are playing under competent supervision and care.

"I agree to sponsor special days of interest to the San Diego people from other states, such as 'Texas Day', 'Oklahoma Day', etc.

"I agree to have special 'Kid Days' with features such as clown, free candy, free ice cream, plus special attractions by which means we will make the children of San Diego feel that Mission Beach Amusement Center is really *their* park.

"I agree to sponsor various contests, such as bathing beauty contests, etc., not only for the purpose of community interest but also as a device to gain publicity for the Amusement Center, as well [540] as favorable national publicity for the City of San Diego.

"I agree to reserve one night during each week and operate it as a special night for the enjoyment of the service personnel. This night is to have special features and reduced prices as added inducements, such reductions to provide soft drinks being sold for five cents and hot dogs for five cents.

"I agree to donate the ballroom and all of its facilities one afternoon per week to the USO at no charge whatsoever, and also to donate the Mission Beach Ballroom

(Plaintiff's Exhibit 8)

on any afternoon to any military organization, whose project is approved by the City Council, at no charge to these organizations. I will pay all utility and cleaning-up costs for the USO or these other approved military organizations.

"15. I agree to operate the Amusement Center without interruption from May 15th to September 15th, inclusive, of each year, and shall endeavor to extend this period of time to a year round basis by proper advertising, promotion, activities, and inducements. I also agree to comply with the other specifications of paragraph 15.

"16. Agreed as stipulated.

"17. I am a permanent resident of the City of San [541] Diego, owning my own home and at the present time I am successfully engaged in the amusement business as the operator of the Ratliff Ballroom. I also have an application on file with the Federal Communications Commission on which approval is pending for the construction of a radio station in San Diego. My experience in the amusement and entertainment world has been varied and extensive for the past twenty years, having been successfully connected with radio, theatre, and ball-room enterprises. In the retail business I operated on a large-volume, low-profit policy—and I am convinced that the same plan can be carried out successfully in the amusement business and at a great advantage to the city and its residents. My experience as a business man has been very stable having successfully operated a chain of retail stores in Southern California. I achieved the reputation of being the outstanding promotion and advertising man in my field in the entire United States. Proof of this reputation is supported by free space in leading

(Plaintiff's Exhibit 8)

publications, such as a full page in Life magazine, write-ups in Time magazine, articles in various trade publications, mention on many coast to coast broadcasts by various commentators as well as publicity and pictures in over 300 newspapers in the [542] United States. My wide-spread experience in promotion and publicity will be a valuable contribution to the successful operation of the park. A great part of my amusement and entertainment experience has been more civic in nature than as a means of personal profit and it is from the civic standpoint that I expect to operate the Amusement Center. Testifying both to my ability as a business man and indicating the reaction to my part in civic affairs in my former home, Burbank, California, I am enclosing letters from the Mayor, three councilmen, a banker, the Chamber of Commerce, a publisher, and a judge. (See enclosure 'A')

"I shall also be happy to submit a certified statement showing a net worth in excess of \$100,000.00.

"18. I agree to operate the ballroom six nights each week from May 15th to September 15th, inclusive, of each year, utilizing a policy of presenting famous 'name' orchestras and 'name' attractions, through an arrangement with nationally known booking agencies. I am attaching to this bid, letters from two of these agencies, the William Morris Agency, and the Frederick Brothers Agency. (See enclosure B) both of whom have under contract many of the most famous attractions and bands in America. Famous bands and attractions from [543] many other booking agencies are also available, and it will be my policy to present only the greatest attractions in the country at the ballroom.

(Plaintiff's Exhibit 8)

"In addition to the day stipulated above during which time I agree to operate the ballroom, I shall endeavor to with the full resourcefulness of my ability and knowledge to continue dancing at the ballroom the year round on a basis of six nights per week, observing this policy simply as a means of attracting people to the park and to make a year round amusement zone for the benefit of the public. Should this operation become too costly from a standpoint of good business judgment I will at my own option change the policy to whatever policy I deem best for the benefit of the park. I do guarantee, however, that during the season from September 15th to May 15th that I shall hold dances at the ballroom at least one night each week with every effort made to include the greatest number of days possible.

"I agree to use all practical methods of advertising for the park and the ballroom including newspapers, billboards, street cars, street cans, broadcasts, etc. Our advertising will feature a theme of 'An Amusement Center for the Entire Family.' [544] ,

"I agree to secure a radio broadcast hook-up from the ballroom for local radio advertising, and also every effort will be made to secure a national hook-up for broadcasting music from the ballroom, which would advertise San Diego to the entire country.

"I agree to prohibit the consumption of every type of alcoholic beverage in the ballroom, and shall employ a policeman and police matron to maintain a creditable standard of dignity and to assure the fact that the ballroom will be operated in a manner that parents will be happy to permit their sons and daughters to spend an afternoon or evening of fun at the ballroom without fears

(Plaintiff's Exhibit 8)

or qualms. In this connection I am pleased to invite the investigation of the City Council into the policy of conduct maintained in the Ratliff Ballroom, which I am operating at present.

"19. I fully agree to this paragraph as stipulated and wish to add this further agreement. No persons in possession of intoxicating beverages will be permitted on the Amusement Center property (beer or wine excepted). A checkroom will be established near the entrance of the park where persons must check their bottles, which will be returned to them on their way [545] out of the park. A strict system of policing will be arranged to see that persons removing their bottles from the checkroom will definitely leave the premises.

"20. I agree to paragraph 20 as stipulated and I am enclosing a letter from the bonding company as requested. (See enclosure C)

"I also propose to change the specifications of sub-paragraph c and sub-paragraph bb as I do not feel that with my personal financial standing and looking to the protection of the City of San Diego and its citizens, who visit the park, that the limits are set high enough.

"Under sub-pargraaph c you stipulated the Owners', Landlords', Tenants' policy for \$10,000-\$50,000 limit. I propose to raise this to the highest amount that will be issued by an insurance company, said amount not to exceed \$50,000-\$500,000 limit. Also, in paragraph bb I proposed to raise the limit on operation of mechanical devices, etc., to \$15,000-\$30,000 instead of \$10,000-\$15,000 that you have stipulated. I feel that everyone concerned should have this added protection.

(Plaintiff's Exhibit 8)

"21 to 37. Inclusive. Agreed as stipulated.

"In addition to the specifications set forth [546] in your Document Number 350454 I am including as a part of my bid the following conditions which I feel are necessary to the accomplishment of your determination to establish and maintain a better Civic Amusement Park.

"a. I agree to give precedence to residents of San Diego in the leasing of concessions and for employment. Of these I shall favor men and women returning from the armed services of our country. Should I feel that any particular service man or service woman is capable and deserving of operating a concession, but does not have sufficient personal capital, I shall aid in their individual needs. At the same time I shall not demand any remuneration other than the rental percentage established for all sub-lessees.

"b. I agree to have competent maintenance crews maintain cleanliness of restrooms and lavatories, picnic ground, streets, walks, and all other areas included in the boundaries of the leased property. I agree to keep restrooms open for public convenience at all times, and to provide covered trash cans in sufficient numbers to encourage cooperation of the public in keeping the Beach Center clean.

"c. I agree to maintain the picnic ground in a [547] manner which will encourage the use of the premises by the citizens of the community. I shall install various outdoor pits for cooking purposes and incorporate many new features for the convenience of the public.

"d. I agree to establish and maintain an information booth or courtesy booth, where a trained attendant will

(Plaintiff's Exhibit 8)

issue information concerning the park, its free facilities, the rules governing the privilege of beach fires, safety of the surf, use of the picnic grounds, and diagrams of the location of various facilities, as well as other information regarding the beach and other attractions in the San Diego area usually much desired but seldom supplied a visitor.

"e. I agree to establish at least one concession, and more should business warrant, which will specialize in the selling of dairy products for children. This concession will be known as the 'milk Bar' and will occupy a favored space in the amusement Center.

"F. I agree to turn over the entire facilities of the Mission Beach Amusement Center to the City Welfare Department or any other organization designated by them for at least one afternoon per week, with the [548] object that this be used for the purpose of carrying out a vocational program for youth. I shall cooperate to the extent of turning over management, operation, publicity, policing, etc., for these afternoons, which will be utilized as a means to carry out a very fine youth project, keeping youth occupied and at the same time giving them a complete understanding of business operation. Special entertainment features will be arranged for these days and with proper cooperation they will develop into one of the most interesting and important youth activities in the country. I shall at all times cooperate with the Coordinating Council, P. T. A. and the City Welfare Department.

"g. I agree to set aside one complete week during the period of time from May 15th to September 15th, inclu-

(Plaintiff's Exhibit 8)

sive, of each year, and during this week we shall donate 10% of the 'gross receipts' of the Misison Beach Amusement Center to any charity or charities designated by the City Council. These 'gross receipts' shall be defined as all money taken in by all concessions and shall not constitute the meaning of 'gross receipts' as defined in your Document Number 350454 in paragraph 5. This week shall be known as 'Charity Week' and will be established as [549] a major promotion during our busy season.

"h. I agree to fully protect the patrons from annoyance by barring and expelling from the premises all persons of a lewd, dissolute, or obnoxious nature, suspected of, or guilty of, rowdyism, vandalism, or persons in an intoxicated condition.

"i. I agree to solicit the cooperation of the Health Department to assist in setting standards that will establish cleanliness of the property, disposal of garbage, drainage of sewage, and the physical health of all people dispensing food.

"j. I agree to furnish the park with proper police protection. It is my understanding that at the present, policing is done by the San Diego Police Department and I shall request that additional policemen be stationed at the park at all times to enforce the rejection of undesirable or drunken patrons, to maintain our rules as to moral standards, to prohibit the presence and use of alcoholic beverage (other than wine or beer) and to properly protect the amusement zone, picnic ground, beach fronts, parking lots, and the ballroom. To cooperate in the policing of the area I agree to maintain on my payroll during the entire year at least two private policemen and

(Plaintiff's Exhibit 8)

more when it becomes necessary. These private policemen [550] will work with, and cooperate with, the San Diego Police Department. Our policy of running a fine park will require the strictest of policing and I agree to see that our pledge to run a fine park will not be violated.

"k. I agree to show at least twice monthly, free movies for the children, which will probably take place on Saturday afternoons or on holidays. This stipulation shall be subject to the approval of the Fire Department and Necessary City regulations governing the showing of movies in a ballroom.

"l. I agree to have all employees of the park fingerprinted and photographed and the records turned over to the City of San Diego Police Department for approval before employment.

"m. I would like to have the City erect a building when conditions permit, or, as a temporary measure, to purchase an available army barrack for the purpose of establishing a Youth Center, where youth could carry on its own various projects. I would agree to maintain this building and be responsible for proper supervision. I am quite certain we could receive the assistance of some welfare organization or organizations, and such a project with all of its advantages would serve to make youth feel that Mission Beach Amusement Center is really [551] their own park.

"n. I agree to establish the board walk as a fun and food zone and every effort will be expended to create an environment that will attract people to the board walk.

(Plaintiff's Exhibit 8)

"The possibilities of creating a public service beyond conception is inherent in the facilities of the Mission Beach Amusement Center. The alteration, development, and conduct of this park presents a challenge to my ability and financial condition that I would like to accept. My program is based entirely upon my vision of converting every dollar of its value into an expansive, wholesome, municipal playground devoted to the public good. In order to operate Mission Beach Amusement Center as an asset to the community instead of a liability, and to offer the public low prices plus the many advantages which I propose to offer, then it is necessary to sacrifice a percentage of the profit.

"To this end, I need one consideration from the city officials. The features which are incorporated in my proposal, together with the establishment of prices geared to the pocket of a school-boy, and the service man, and the non-profiteering of civilians, will not pay the operator a large cash profit. On this basis I cannot [552] sincerely obligate myself to pay an excessive rental. My plan is founded on a careful estimate of the income of the beach as operated under the enclosed proposal. My agreed percentage of rent payable to the City is the maximum allowable if we are to succeed in the major objective—to create a park for the citizens of San Diego.

"With high present day costs of labor and foodstuffs you can readily see where everyone concerned would have to take a smaller percentage of the profit in order to make for a successful operation under my proposed low ceiling of prices. It is necessary to operate the park just as if it were a civic operation with a civic purpose, to

(Plaintiff's Exhibit 8)

run it on a higher level with a policy not primarily for profit but rather a policy for service to the citizens of the community, with a definite thought in mind for post-war planning as well as for the present.

"The citizens of San Diego have a right to expect that in a municipal owned park, even though it would be leased to an individual, that one should be able to enjoy decent food at reasonable prices, that they should have a park where they can spend a pleasant afternoon or evening without subjecting themselves to unscrupulous profiteering. They are entitled to dance in a ballroom [553] of refinement. They should have proper protection, and they certainly are entitled to a good, clean, wholesome park.

"The parents in this community must be made to feel that in sending their sons or daughters to the Amusement Center that they will be sent to the most wholesome, best protected, cleanest park in the state. They must be made to feel that for their small children, that the attractions will be interesting, that the equipment in the playground will be the finest available. They must be made to feel that the Mission Beach Amusement Center can offer and does offer their older sons or daughters a place for fun and relaxation, and not a place where they can get into trouble. They certainly are entitled to all of these features in a municipal owned park and I agree to see that they receive all of them, plus many more features.

"Personal profit is going to be sacrificed in part for community service, and I agree to operate the Amusement Center so that service personnel and civilians alike can go with the minimum amount of money and derive the

(Plaintiff's Exhibit 8)

maximum amount of fund and pleasure—clean, wholesome fun and enjoyment—to have the type of park where ‘teen-agers’ as well as older folks can spend their afternoons or evenings without the fear of [554] vandalism, embarrassment, or rowdy acts marring their good time—a park where down-to-earth prices prevail—a dime for a soft drink, a dime for a hot dog, a dime for amusement in the fun zone and above all, a park where the operation of the entire area will be a definite asset to the city—a park where you and the citizens of this community will be proud and glad to take the entire family.

“It is clear to me from the terms and specifications of the contract that the city officials are making a determined effort to deliver this property to the people under terms that will insure its greatest possible service. I understand its terms and its intent, and it is with this thought in mind that I submit my bid.

“Respectfully submitted,

“(Signed) Larry Finley” [555]

Attached thereto are letters.

From William Morris Agency, Inc., Beverly Hills, California:

“September 13, 1944

“Mr. Larry Finley,
718 Bank of America Bldg.,
San Diego, California

“Dear Mr. Finley:

“Pursuant to our telephone conversation of today, if you complete your plans to take over the Mission Beach

(Plaintiff's Exhibit 8)

Ballroom in San Diego, we should be happy to arrange our various name bands for appearances with you when they are available in this territory.

"A partial list of our attractions include:

"Georgia Auld	Neil Bondshu	Henry Busse
Count Basie	Del Courtney	Al Donahue
Al D'Artega	Billy Eckstine	Earl Hines
Duke Ellington	Enric Madriguera	Hal McIntyre
Vaughn Monroe	Artie Shaw	Boyd Raeburn
Carl Ravazza	Ozzie Nelson	Freddie Slack
	Paul Whiteman	

"I'd appreciate your calling me when you are in Los Angeles so we can discuss your policy further and at that time I can possibly give you tentative dates when the above orchestras will be available.

"Cordially,

"Jack Flynn,
William Morris Agency, Inc." [556]

"City of Burbank
California

Office of the Council
"September 28, 1944

"The Honorable City Council
City of San Diego,
California

Gentlemen:

"Regarding Mr. Larry Finley, I wish to inform you that I have known Mr. Finley for the past six years, he being a leading business man here in our City of Burbank.

(Plaintiff's Exhibit 8)

"Mr. Finley is, in my opinion, a genuine American citizen, the type of an individual that is always interested in worth while civic affairs, and a citizen that would be a credit to any community.

"I am confident that you will never have reason to regret any consideration given my friend Larry Finley.

"Very truly yours,

"Walter R. Hinton,
Mayor of the City of Burbank."

"City of Burbank
California

"September 27, 1944 [557]

"Honorable City Council
City of San Diego
California

"Honorable Body:

"It is with a great deal of pleasure that I write to you in regard to Mr. Larry Finley, a former business man of Burbank. I wish to tell you that Mr. Finley conducted himself and his business operations in such a fine manner and was such an enthusiastic worker and contributed to all of our local and civic enterprises that he will be a credit to any community that he may locate in. I personally would be pleased to have him in Burbank and we miss his presence and assistance in our city. I have worked side by side with him in our numerous War Bond Drives and found him to be not only a fine gentleman

(Plaintiff's Exhibit 8)

but a man full of ideas and help that made it very easy for some of us to make a success of our drives.

"I do hope that you will be able to assist him in any plans he might have.

"Thanking you, I remain

"Yours very truly,

"Horace V. Thompson, Councilman."

On the stationery of the City of Burbank, California, [558] October 4, 1944, addressed to:

"City Council
City of San Diego

"Re: Larry Finley

"Gentlemen:

"I have known the above gentleman, Mr. Larry Finley, for approximately the past five years. During this time, Mr. Finley was in the jewelry business in the City of Burbank.

"Immediately upon Mr. Finley's arrival in the City of Burbank, approximately five years ago, he became very active in civic affairs, Chamber of Commerce and other worthwhile activities.

"He conducted one of the most successful businesses in the city. I have always found him to be just, fair and a man to live up to any agreements that he may have made.

(Plaintiff's Exhibit 8)

"I have personally done business with him and have found him to be exceptionally well qualified as a business man.

"Yours very truly,

"Paul L. Brown,

"Police Commissioner,"

Another letter on the stationery of the City of Burbank, California, dated October 2, 1944, addressed to: [559]

"City Council
City of San Diego
California

"Gentlemen:

"The bearer of this letter, Mr. Larry Finley, has been actively engaged in the jewelry business, in the City of Burbank, for the past four or five years; during which time he has been a resident and quite active in local civic affairs.

"I have personally known and transacted business with Mr. Finley, and have found him to be a man of integrity. Any consideration you may show to him will be appreciated.

"Cordially yours,

"Albert J. Rediger."

(Plaintiff's Exhibit 8)

On the stationery of the City of Burbank, California,
September 27, 1944, addressed to:

"To the Honorable City Council
City of San Diego
San Diego, California

"Gentlemen"

"I have been informed that Mr. Larry Finley, who was in business in this city, is desirous of making some connections in your city. [560]

"For your information I have known Mr. Finley personally ever since he came to Burbank and consider him a good businessman and a very fine citizen.

"Mr. Finley has been very active in civic matters, bond drives, and many other things during his residence here. We have always considered him a valuable asset to the community. He is a fine fellow, energetic, and has always taken a personal interest in his fellow man.

"Anything you may do for Mr. Finley will be very much appreciated by me and I am sure that your city officials will never have cause to regret giving him every consideration.

"Very truly yours,

"R. L. Reid,
Police Court Judge."

(Plaintiff's Exhibit 8)

"Burbank News

"Sept. 27, 1944

"City Council

City of San Diego

San Diego, California

"Honorable Gentlemen:

"I am writing this letter to ask that you do everything in your power to assist Mr. Larry Finley. [561]

"It has been my pleasure to have known and worked with this fine gentleman for the past several years in various civic, city and business matters. Here in Burbank he was looked up to by everyone as an aggressive, community-minded, fair and honest and most willing worker in community undertakings. In a business way, where I knew Mr. Finley even more intimately, I found him at all times most honorable, fair, very aggressive, intelligent and reliable.

"Without hesitation I can certainly recommend Mr. Finley to you and the City of San Diego. My only regret is that he no longer is here with us in Burbank.

"Very sincerely yours,

"James E. Lintner, Publisher, Burbank News."

(Plaintiff's Exhibit 8)

"Burbank Chamber of Commerce

"September 21, 1944

"Honorable City Council
San Diego, California

Gentlemen:

"It is with pleasure we write this letter on behalf of Mr. Larry Finley, who for several years was an active business man of Burbank.

"Mr. Finley, during his several years activity here, was not only one of our most active merchants [562] but he gave unstintedly of his time in assisting us in our various civic activities. At no time have we ever heard anything detrimental to Mr. Finley's character and we are very pleased to write you this letter in his behalf.

"Very truly yours,

"Burbank Chamber of Commerce

"By C. C. Richards, Jr.,

"Secretary-manager."

This letter is on the letterhead of the Bank of America, Burbank, California, September 27, 1944.

"Honorable City Council
City of San Diego
San Diego, California

"Gentlemen:

"This letter is being written to give you the benefit of my past experience and knowledge of Larry Finley, formerly of Burbank who is now located in your city.

(Plaintiff's Exhibit 8)

"Mr. Finley was a resident of Burbank for a period of approximately five years during which period of time he was engaged in the jewelry business.

"During the interim that Mr. Finley was located in Burbank he was quite successful from a financial [563] standpoint, and at the time of disposing of his business, represented considerable financial strength, the major part of which was in liquid form.

"While here he was also quite active in civic affairs as well as taking a very active part in the various bond drives. He was a member of the local Chamber of Commerce and was well regarded by the various merchants in our city.

"It is my opinion that he would never abuse any consideration shown him.

"Very truly yours,

"J. L. Hey, Manager."

This next letter is on the stationery of Robert F. Driver, General Agents, 626 Commonwealth Building, San Diego, California.

"October 26, 1944.

"The City of San Diego,
Civic Center,
San Diego, California.
"Attention: City Manager
"Gentlemen:

"We wish to advise that our Company, The Pacific Employers Insurance Company, will supply a performance

(Plaintiff's Exhibit 8)

bond to the City of San Diego on behalf of Mr. Larry [564] Finley in connection with his bid to the City on the Mission Beach Amusement Center, in the amount of \$20,000 which is in accordance with specifications in bid instructions.

"Yours very truly,

"Pacific Employers Insurance Co.

"Robert F. Driver, Attorney-in-Fact."

A letter on the stationery of Frederick Bros. Agency, dated September 14, 1944, addressed to:

"Mr. Larry Finley,
#718 Bank of America Bldg.
San Diego, California

"Dear Larry:

"As per our recent phone conversation wherein you stated that there was a possibility of your leasing the Mission Beach Ballroom, I am herewith listing some of our attractions that would be available for your use in the near future. I would like to say and remind you again that should this happen we can supply you some of the greatest name attractions in America today and naturally, we would like to do it on an exclusive basis and by our having your place exclusively you could be assured of nothing but the finest talent in the business. [565]

"The following is a list of the orchestras that would be available for your place:

"Lawrence Welk and His Champagne Music:

(Plaintiff's Exhibit 8)

Ina Rae Hutton and Her Famous Orchestra;

George Paxton, 23 piece band breaking records Rose-land Ballroom, New York;

Milt Britton, world's greatest comedy and dance band;

Ray Herbeck and His Columbia Recording Romance and Rhythm Orchestra;

Ada Leonard and Her All American 18 Piece Great Orchestra;

Tommy Reynolds, America's young 'Swing King';

Anson Weeks, famous 'Let's Go Dancin' With Anson' Orchestra;

Carlos Molina, just closed sensational 16 week engagement Palace Hotel, San Francisco;

Col. Manny Prager, ten years on Ben Bernie's show;

Don Reid Orchestra, now in 9th month at Trianon Ballroom, Chicago;

Pinky Tomlin Orchestra;

Phil Levant Orchestra;

Billy Bishop, now Aragon Ballroom, Chicago.

"Also we have in colored bands:

"Fletcher Henderson's World Famous Orchestra;

Ernie Fields' Okey Recording Orchestra; [566]

"The 18 International Sweethearts of Rhythm.

(Plaintiff's Exhibit 8)

"The foregoing is a partial list of some of our larger names and when the time comes, I can give you many more to choose from.

"Also I am listing a few of the names that will be available to you:

"Willie Howard	Rufe Davis
Ella Mae Morse	Belita
Bonnie Baker	The Condos Brothers
Fifi D'Orsay	Judy Starr
Dorothy Donegan	Ida James

"Larry, I hope the above list which is only a partial list of the artists we represent exclusively, will supply the information you need. You, of course, realize we are one of the four largest agencies in the business today and the above is only a partial list of the attractions we can offer you when the time warrants.

"I am looking forward to seeing you again in the very near future and I hope and know as always your business venture will be a great success.

"If there is any added information you need as to our available talent, please do not hesitate to call upon me as it would be a pleasure to be of service to you.

"Sincerely
"Billy."

Typed, "Billy McDonald, Frederick Bros. Agency, Inc." [567]

Postscript: "We also have innumerable screen stars under contract to us. I can supply this list at your request."

Initials typed, "BM."

That is all.

The Court: I think it is about the hour of adjournment.

Now, ladies and gentlemen, we will take a recess in this case until Monday morning at 10:00 o'clock. During the recess and throughout the case, ladies and gentlemen, do not read any mediums of publicity concerning this case, either in newspapers, trade journals, magazines, radio scripts, or any other method of communication. Let us try the case in the court room, and exclusively here. If you happen to be a radio fan and turn on your radio and some so-called commentator is discussing this case, please turn the radio to some other more interesting and more helpful program. I am sure you will get all of the aid you need in this case from the lawyers in the case, and from the witnesses, and from the instructions of the court from the bench, so that it is not necessary to be at all curious or to have any interest in any outside communications that may come your way.

Remember that, ladies and gentlemen, and be here on Monday morning at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p. m. February 1, 1946, an adjournment was taken until 10:00 o'clock a. m., Monday, February 4, 1946.) [568]

Los Angeles, California, Monday, February 4, 1946.
10:30 a. m.

The Court: All present. I am very glad that I did not inconvenience you too much, ladies and gentlemen, as well as counsel. Proceed.

Mr. Doherty: If the court please, I just spoke to Mr. Christensen. I see Mr. Dailard is in the court room. I would like to ask him one question to clarify one fact for the jury, that I did not ask him when he was on the stand.

The Court: Very well. Call him.

Mr. Doherty: Mr. Dailard, please.

WAYNE W. DAILARD,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Re-Cross-Examination (Continued)

By Mr. Doherty:

Q. Mr. Dailard, you have already been sworn. In both your direct and cross-examination on the stand the other day, you were asked about the profits at the Mission Beach operation, and you gave certain totals.

A. That is correct.

Q. Now, were those totals the profits from the entire operation of Mission Beach, or just a portion of them?

A. The entire operation. [570]

Q. Can you break down the amount that would have been earned or was earned by the Ballroom, as distinguished from the recreation area?

Mr. Christensen: May I ask one question on *voir dire* before the question is answered:

(Testimony of Wayne W. Dailard)

The Court: Yes.

Mr. Christensen: Have you brought all records of the profit and loss statements showing that?

The Witness: I haven't, no.

Q. By Mr. Doherty: You haven't them with you?

A. No, sir.

Q. But in your computations did you keep a separate record as to the amount you earned in the Ballroom as distinguished from what you earned in the rest of the recreation area? A. Yes, sir.

Q. Now, in 1943 you gave your total net earnings for the Mission Beach operation of \$72,759.66, and in 1944 the total net earnings by the Mission Beach operation was \$79,924.53. What portion of that was earnings of the Ballroom as distinguished from the rest of the operation?

A. I imagine about 25 per cent. I think it would run close to 25 per cent.

Q. Was it more or less than 25 per cent for each year?

A. It could have been less in '43. [571]

Q. Would 25 per cent be your best estimate for 1944?

A. Yes.

Mr. Doherty: That is all.

Re-Direct Examination

By Mr. Christensen:

Q. You have no records of this at all, is that right, Mr. Dailard?

A. Not with me, no.

Q. When did you last check those records?

A. I took my total profit and loss figures off about 10 days ago.

(Testimony of Wayne W. Dailard)

Q. Well, when did you last check as to your Ballroom, as distinguished from your entire operating profits?

A. At that time it was kept as a separate account.

Mr. Christensen: All right. Thank you very much, sir.

Mr. Doherty: That is all, Mr. Dailard. You will still keep yourself available for we may need you for testimony on other issues, please. [572]

The Court: Call your next witness.

Mr. Christensen: Mr. Finley, please.

LARRY FINLEY,

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Christensen:

Q. Your name is Larry Finley; is that correct, sir?

A. Right.

Q. And you live here in Los Angeles, do you, sir?

A. Right.

Q. With your wife and family? A. Right.

Q. I believe you are 32 years of age, are you, Mr. Finley? A. Right.

Q. You are interested in the band and entertainment business? A. Yes.

Q. For what period of time have you been interested in that business, sir? A. Since 1928.

(Testimony of Larry Finley)

Q. What was it that you were doing at that time?

A. Well, in 1928, right after I finished high school, [573] I went to work for the Station WSYR in Syracuse.

Q. That sounded like a radio station, is that right?

A. That is right. I went to work for WSYR in Syracuse, both in the commercial and announcing staff and had quite a bit to do with the production of shows.

Q. That is radio shows, I take it? Is that correct, sir?

A. That is right.

Q. How long did you remain at that occupation?

A. Well, not too long. I learned a bit of the band business and decided to go out on the road with a band. I had my own band, not as a regular occupation or diet, but for a period of—

Mr. Christensen: Keep your voice up, sir.

A. —for a period of approximately two years, I should say.

Q. Your statement is not quite clear to me: “not as a regular business.” Explain what you mean, sir.

A. Well, in those days, the music business was none too remunerative financially, and I am employed in a jewelery store in Syracuse and used to take engagements at nights or on Sundays, and during the summer months I would leave town with the band for a week or a month or two-month engagement, whatever there would be.

Q. You were the leader and organizer of the band, I take [574] it?

A. Yes; that is right.

Q. And that continued for how long, sir?

A. Do you mean the band business or the general entertainment business?

(Testimony of Larry Finley)

Q. Well, that occupation or those occupations, working the jewelry store in the daytime and bands evening and summers; how long did that last, sir?

A. For about two years.

Q. What did you next do?

A. Well, I became advertising manager of the Penfield Manufacturing Company in Syracuse.

Q. What is that?

A. That is a firm devoted to the manufacture of bedding?

Q. Of what? A. Bedding, mattresses.

Q. Oh, I see. And your work there was promotional and advertising?

A. Yes. It had to do mostly with radio promotion. We had a mattress that we called the Ever Rest mattress, and in order to promote the sale of it I conceived the idea of getting a singing team, two people, and we called them "The Ever Rest Boys". We presented them on the radio all through New England, and I also arranged for personal appearances of this team in various theatres throughout New England, [575] mostly at luncheon clubs, Kiwanis, Rotary, Lions, etc.

Q. That began about when, sir?

A. That is quite a ways back, Mr. Christensen. I believe it was in—I believe it was in '32, or it might have been '33.

Q. And it continued for a period of how long?

A. A year.

Q. And then what did you do next?

A. My next step into the entertainment business was to assume management of the Cafe DeWitt in Syracuse. The cafe DeWitt was a half-million-dollar night club

(Testimony of Larry Finley)

that had the reputation at the time of being the finest night club in New York State. I took that club over in January of 1934—yes, January of 1934, operated it for a six-month basis or for six months, I should say, which was just prior to my coming out here to California.

Q. Operating the restaurant, what, if anything, did you have to do with entertainment there, bands and similar attractions?

A. Well, I booked bands; I booked and produced my own shows. We had at that time the finest name bands appearing there and we had some very large shows. We had as many as 60 people in our shows there. I might add that the club was a "white elephant" when I took it over, and it was the only time in the history of the club that it showed a profit, [576] was the six months that I had it.

Q. Then, you next did what, sir?

A. Came to California on a vacation.

Q. That was in 1934, I take it?

A. 1934; that's right.

Q. And? A. Liked it and stayed.

Q. You have done something since then. Will you start with when you came and tell us what it was, sir?

A. Well, when I first came out to California I wanted to stay in the entertainment business and I called on several places, tried to get a job and didn't have any luck. I covered all of the radio stations and found that I couldn't make a living wage in radio at the time, went out to what was then called the Cotton Club—Frank Sebastian owned it—spent about a week with Frank, trying to get a job and couldn't, and decided that I would go back to the jewelery business.

(Testimony of Larry Finley)

Q. Did you?

A. Yes, I did. I went to work on Broadway in a jewelry store.

Q. How long did that last?

A. Well, my first job lasted two weeks and then I was offered another job with another store and that job lasted over five years. [577]

Q. Which one is that, sir?

A. That was with the Hudson Diamond Company.

Q. And then you went into business for yourself, didn't you? Or in partners with somebody?

A. Yes. In 19—1939—it was October of 1939 I went into business for myself.

Q. Where was that?

A. I opened a small store in Burbank, did quite well with it, and within a period of a year's time I was operating three stores in the Valley.

Q. And did you do any promotional or advertising work there?

A. Yes. You see, Mr. Christensen, I really don't know a great deal of the jewelry business. My main forte has always been promotion. And I applied showmanship to the jewelry business, plus the fact I gave people very good values, and made a very nice success out of the jewelry business. Practically everything we did was promotion.

Q. Well, can you illustrate?

A. Well, I was very active civically, as you know, with various bond drives. I staged a picnic for the Lockheed Aircraft Company employees at Santa Anita Park. We had over 80,000 people there; I put on various dances at the Casino Gardens.

(Testimony of Larry Finley)

Q. Tell me about that. That was what I was really [578] asking you about, without trying to direct your attention to it definitely.

A. Well, I rented the Casino Gardens for an evening, took a dull evening—

Q. Now, would you permit me to interrupt? That Casino Gardens is the same Casino Gardens we have been talking about here? A. Yes, it is.

Q. It has the ballroom situated in the Ocean Park location?

A. That is correct. I took the Casino Gardens over. Usually it was on a Tuesday or Thursday night, and issued tickets. We would print as many as 10,000 tickets, and distributed them to the aircraft workers at Lockheed. There was no obligation to these people. We would stage a private dance for them on an evening. We would give them a thousand dollars in merchandise prizes that night. I would arrange for some of my friends in the band business and picture business to come down and make a personal appearance. We had as many as 7,000 people there in one night.

Q. How many of those dances did you put on?

A. Oh, probably half a dozen. Then we had other lines of promotion work. We were the first store in the country—we originated—we have been credited by Prentiss Hall as originating— [579]

Mr. Doherty: Just a minute.

Q. By Mr. Christensen: Just tell us what you did, not with Prentiss Hall, for instance. That does not even

(Testimony of Larry Finley)

register with me, and probably with no one else. But tell me what you did yourself.

A. Well, I was the first store in the country to sell work uniforms in a jewelery store for the aircraft workers at Lockheed. We opened several thousand accounts that way.

Here, three years ago, during the height of the shortage of alarm clocks I put on an alarm clock sale that received a full page of publicity in Life Magazine and a quarter page in Time.

I had radio broadcasts originate from the store in line with bond drives; sold 6,000 goldfish one Saturday in the jewelery store, and through a lot of promotion that we were doing. [580]

Q. All right. And that continued for how long, sir?

A. In the jewelery business?

Q. Yes. A. January of 1944.

Q. Then what did you do?

A. I went to New York City, moved to New York.

Q. What did you do there?

A. I went in the watch importing business in New York City. We imported watches for the Army primarily.

Q. How long did that continue, sir?

A. It continued until July of the same year.

Q. July of 1944? A. That's right.

Q. Then you came back out here?

A. Then I came back out here.

Q. What did you do upon returning here, sir?

A. Well, I came back, or, I should say I went to San Diego after filing an application in Washington with the F. C. C. for construction of a radio station.

(Testimony of Larry Finley)

Q. That is the Federal Communications Commission, I take it, sir?

A. That's right. We filed an application in Washington.

Q. Who is "we"?

A. I had a partner in that.

Q. What is his name? [581]

A. McKinnon.

Q. That is Clinton McKinnon, the publisher of the San Diego Journal?

A. Correct. We filed an application in Washington, I believe it was in July, and not knowing how long it would take for the application to go through, I immediately went back to San Diego.

Q. Go ahead and tell me what you did, please, sir?

A. I got back there and got tired of waiting around after a couple of weeks, and I wanted to go back in some phase of the entertainment business, so I made a quick survey of the city of San Diego, decided there was a good business there, and I purchased the Trianon Ballroom. It was then the Radcliffe Ballroom in San Diego.

Q. You say that was in August, or so, of 1944?

A. I think it was in the first part of August.

Q. All right. Then since August of 1944 have you continuously operated and managed the Trianon ballroom? A. I have.

Q. After you took it over you changed the name from Radcliffe to Trianon? A. That's right.

Q. Now, your operations there at the Trianon Ballroom, will you briefly describe them?

A. Well, the Trianon is probably the finest upstairs [582] ballroom on the Pacific Coast, 10,000 square feet,

(Testimony of Larry Finley)

with a capacity of 1500 people. We don't serve any alcoholic beverages there, and at present we are utilizing a policy of semi-name bands. We changed—we operate on the basis of six nights a week for public dancing, and Monday night, the seventh night, we have old time dancing, which has become quite an institution. Our admission prices are \$1.25 for gentlemen, 75 cents for ladies, and on Monday nights for older people there is a 50-cent charge.

Q. Now, the Trianon used, I believe you said, semi-name bands. Am I correct, sir?

A. That is correct.

Q. The area of the Trianon Ballroom is?

A. 10,000 square feet.

Q. And will accommodate how many couples?

A. Approximately 750 couples.

Q. In other words, about 1500 people can get in there?

A. That's right.

Q. Why don't you use name bands there, sir?

A. It isn't large enough. We couldn't pay for a name band, if we had it, with that limited capacity.

Q. Have you noticed whether there has been any change in the attendance there, and I am speaking numerically, in the Trianon since you had it up to this time?

A. Numerically? [583]

Q. Yes.

A. Yes, business has greatly improved. We are getting many more people than previous to the time I took it over.

Q. Well, let's use V-J-Day, which was August 14th?

A. Yes.

(Testimony of Larry Finley)

Q. Let's use that as a basis, and tell me was there any change after that, numerically, of course.

A. Since V-J-Day?

Q. Yes.

A. Yes, our business has dropped off since V-J-Day.

Q. At the Trianon? A. Yes, it has.

Q. Have you noticed the trend in population there in San Diego? A. You mean now?

Q. Yes, since you have been there.

A. Our business has dropped off at the Trianon about 5 per cent since V-J-Day, and I don't know that I have noticed that much drop-off in population since I have been there.

Q. Now, the next thing you did in the way of entertainment in the band business, after acquiring the Trianon, was what, sir? A. Mission Beach.

Q. How did you become acquainted with Mission Beach?

A. Well, being in the ballroom business in San Diego, [584] there was a great deal of comment on Mission Beach, the fact that it was coming up for lease. That's how I first heard about Mission Beach.

Q. And did you visit Mission Beach?

A. Yes, I did, one night.

Q. When was that, sir?

A. Well, at the time I visited in Mission Beach I was living in La Jolla, and I used to drive down to the Ballroom every night about 7:00 or 7:30 with an empty car, and there was an anti-aircraft station stationed between my home and the Mission Beach Amusement Center.

(Testimony of Larry Finley)

Q. That is an Army station you are talking about?

A. No, it was a Navy station.

Q. All right. Go ahead.

A. I had the habit of picking up boys there every night and taking them into town. This particular night I picked up two boys that were on their way to Mission Beach, so I decided—I had heard so much about Mission Beach, I decided I would go in with them and see just what was happening there?

Q. Did you do it? A. Yes, sir, I did.

Q. What, if anything, did you observe?

A. Well, I was in there about a half hour, and the two boys were my guests, and I spent close to \$50.00 in the half-hour I was there. [585]

Q. Did you go in the ballroom?

A. No, that evening the ballroom wasn't open. The park, however, was.

Q. All right. Now, then, did you visit Mission Beach again?

A. Yes, I was out there, oh, a half dozen times between that time and the time that I secured the lease on the property.

Q. I am interested in knowing, Mr. Finley, and I want you to tell us what you did in the way of an investigation, if any, of the Mission Beach Ballroom and the Mission Beach Park prior to making your bid.

A. Well, the first thing I did, when I made up my mind I would probably like to get the place, was to go down to the newspaper files and go through them for the last five or six years to get a picture of what was happening there. I found on going through the files that the year previous to the opening of the Square, that the

(Testimony of Larry Finley)

Ballroom had played such bands as Benny Goodman, Horace Heidt, Jan Garber, in fact, Tommy Dorsey, and all of the larger bands, which led me to believe that the operation must have been profitable or they would not have continued the policy of name bands there. I walked around the Beach area, and I rang doorbells and talked to people, to see what they thought of the Beach and the possibilities of it. [586]

Q. Did you visit Mission Beach while the Ballroom was open? A. Yes, I did.

Q. On what occasion was that, sir?

A. Well, the first night was—it was before I put my bid in to the City. The first night was in September. In fact, it was a Friday, Saturday and Sunday night, and Freddie Martin was playing at Mission Beach, and—yes, it was Freddie Martin the three nights I was out there. Freddie Martin was playing there.

Q. What did you observe there?

A. Well, I clocked—I say “clocked,” I checked the attendance at Mission Beach, and checked the attendance at Pacific Beach, where Joe Reichman was playing, and there were bigger crowds at Mission Beach with Freddie Martin than downtown, which, in my estimation, was a very fine observation. I talked to Freddie Martin that night.

Q. Don't give us your conversation, just the fact that you talked to him.

A. Yes, I talked to Freddie Martin that night.

Q. All right. Did you talk to anybody else connected with the Ballroom there?

A. Well, I talked to some of the doormen around there, and the girl at the soda fountain. They didn't

(Testimony of Larry Finley)

know who I was. I just wanted to find out what was happening there. [587]

Q. What did you do next with reference to the Mission Beach Amusement Center, and I use that all-inclusive?

A. I went down to the Civic Center, and here I guess it would be termed the City Hall. I went down one morning at a pre-council meeting and had a discussion with the mayor and the councilmen to get their thoughts on what the Mission Beach operation should be. Before I went into it any further, I didn't want to get into anything I didn't think I could handle.

Q. What did you do next?

A. Well, there was so much happening at that time.

Q. Did you do anything in the way of checking the operation of the Mission Beach Ballroom or the availability of bands, or anything like that?

A. Yes, I did. I talked to the General Amusement Company.

Q. Who did you talk with there?

A. Ralph Wonders.

Q. You talked with him. The subject, please, only?

A. The subject was I wanted to know if they would service me with bands in San Diego.

Q. That is the same Ralph Wonders who was here on the witness stand earlier in this trial?

A. Yes. I might add at this council meeting I attended in San Diego I was told—

Q. You can't give us that conversation, Mr. Finley. [588]

A. I am sorry.

Q. That is why I took you away from that. That would be hearsay.

A. All right.

(Testimony of Larry Finley)

Q. Did you talk with Mr. Ralph Wonders?

A. Yes, I did.

Q. I don't want the conversation; just the fact, and with whom did you speak at other agencies? You talked with some of them?

A. I spoke to Ralph Wonders of the General Amusement Company; I spoke with Isabel Katleman and Jack Flynn at the William Morris Agency.

Q. Concerning the same subject, sir?

A. Yes, that's right.

Q. And any one else, sir?

A. To Billy McDonald.

Q. The gentleman who also was on the witness stand here? A. Yes, and Tom Kettering.

Q. That name is new. Will you tell me who he is?

A. He is in charge, I believe, of the Frederick Brothers office on the West Coast.

Q. All right. Did you secure from them the letters which are here in evidence? A. Yes, I did.

Q. Did you speak with either Mr. Dailard or with any one [589] connected with M. C. A. concerning the same subject?

A. Yes, I did, after I received—

Q. Tell me to whom did you speak?

A. I spoke to Hal Howard and Larry Barnet.

Q. Together? A. Yes.

Q. When was that conversation?

A. I spoke to Howard on the telephone.

Q. Wait a minute. Just a moment, please. Mr. Barnet is this gentleman right directly across here with the red and black tie? That is the gentleman you spoke with? A. Yes.

(Testimony of Larry Finley)

Q. And Mr. Hal Howard is the gentleman who has heretofore been on the witness stand? A. Right.

Q. Now, you spoke with Mr. Howard on the telephone? A. Yes.

Q. Will you tell us the conversation, sir?

A. Well, I told Howard on the telephone that I was going to bid on Mission Beach and—

Q. The whole conversation?

Mr. Doherty: I think that would be hearsay, as between this gentleman and Mr. Howard.

Mr. Christensen: Mr. Howard is an officer of the Music Corporation of America. [590]

Mr. Doherty: Not an officer and not a defendant.

The Court: I don't know as his position has been elicited here in court.

Mr. Christensen: I can only tell you what my memory is on it, but I think we can agree that at the time he was in the band or the acts department of the Music Corporation of America, sir.

The Court: I think there is something in the deposition that touches it, but I don't believe there is anything in the record here.

Mr. Warne: He is the salesman of the Music Corporation of America.

The Court: I think it is proper. Overruled.

The Witness: May I have the question again? I am sorry.

(The question was read.)

The Witness: A. I told Hal Howard that I was going to put in a bid for Mission Beach, and that I couldn't get enough service out of the other agencies and wanted to know if something couldn't be done for me

(Testimony of Larry Finley)

with M. C. A. He told me at the time that inasmuch as Dailard secured M. C. A. bands for both Mission Beach and Pacific Square, that if I were to get Mission Beach he could see no reason why I wouldn't be able to get bands for the Beach. And we had quite a lengthy discussion about this, and he suggested that I come up to Los Angeles and meet with he and Larry Barnet, who was head of the [591] band-booking department.

Q. By Mr. Christensen: Did you do that, sir?

A. Yes, I did.

Q. How long after your telephone conversation with Mr. Howard was this? Was it a matter of days, or weeks, or months?

A. It was within the week, I am quite sure.

Q. All right. It was a matter of a few days?

A. That's right.

Q. Where did you see Mr. Barnet and Mr. Howard upon that occasion, sir?

A. In the offices of the Music Corporation in Beverly Hills. At that time they were located in M. C. A. Square in Beverly Hills.

Q. Was any one else present at this conversation, or any part thereof, other than you, Mr. Barnet, and Mr. Howard, sir?

A. Well, no one present at the conversation. There was always people running in and out of his office?

Q. No, I mean that actually participated or were actually present. It was just the three of you?

A. Just the three of us.

(Testimony of Larry Finley)

Q. Will you now relate to us what was said and done there, please?

A. Well, I told Barnet the same story, that I was going [592] to bid on the Beach, and judging from the past operation I figured I was going to be the successful bidder. At first he told me that I should buy into the Casino Gardens in Ocean Park, that it was a fine operation, it wasn't going too smoothly, it needed management, he thought it would be a very good deal for me, and he knew he could supply me with a lot of bands at Casino Gardens. I told him I wasn't interested in Casino Gardens, I was interested in Mission Beach. Then he told me—

Q. On that occasion was anything said about Oakland?

A. Yes. Then he told me of the great opportunities there were in Oakland.

Q. Tell me what he said.

A. Well, that there wasn't a fine ballroom up there, that the city needed a good operator and that they were routing all of their bands up there, and Oakland would be a wonderful place for me to be. I told him I was still interested in Mission Beach. He told me that I should go ahead and that he would take care of me with bands at Mission Beach if I got the lease. He said, "It might be a little tough, but I will be able to take care of you."

Q. Mr. Finley, have you related now, as well as you can recall, all of the conversation which occurred on that occasion? If not, please do it.

A. That is substantially the conversation at that first [593] meeting, Mr. Christensen.

(Testimony of Larry Finley)

Q. All right. Now, what did you do next with reference to the Mission Beach Ballroom, sir?

A. With reference to—how do you mean?

Q. Well, what did you do? Did you make your bid next, or did you see somebody about bands? That is the general subject I am trying to get at.

A. No, I made my bid. I submitted my bid.

Q. Now, the next thing after having talked with Mr. Howard and Mr. Barnet on the occasion you have told us about was to put in your bid; is that correct?

A. Yes.

Q. And the bid is the bid which has been heretofore read to the jury; is that correct, sir?

A. That is correct.

Q. You prepared that and filed that with the City Clerk of the City of San Diego? A. Yes.

Q. Now, what next occurred, sir?

A. How do you mean, what next occurred?

Q. Well, did you do anything more about it prior to the time the bid was let?

A. Oh, yes. Not with M. C. A. I was in contact with the other offices, however, by telephone; General Amusement, and William Morris, and Frederick Brothers. [594]

Q. Yes. Then the next thing of importance was the letting of the bid?

A. Yes, the day that the bid was let.

Q. What, if anything, happened in the council chambers at the time that the bid was let?

A. Well, they read the various bids, and Mr. Ames Bishop from M. C. A. was sitting in the council chambers with Mr. Dailard's attorney. I believe his name

(Testimony of Larry Finley)

was O'Connor, or O'Donnell, I don't recall, and with Mr. Eddie Wakeland, who was on the bid with Mr. Dailard. The attorney got up at the time that they read the bids and made the statement that, "We have Mr. Ames Bishop here, who is a representative of the Music Corporation of America, who would like to explain something to the council about bands." And one of the councilmen, I don't remember who it was, rose to his feet, and said, "We are not interested in hearing anything from Music Corporation of America about bands." And he promptly sat down.

Q. All right. Then the lease of the Mission Beach Amusement Center was awarded to you?

A. That's right.

Q. After that, what was the next thing you did concerning this matter, please?

A. Well, that night at the Trianon Ballroom, about 8:30, Hal Howard walked in, congratulated me, and sat down in the office and we just started to talk. [595]

Q. Just you two alone?

A. Just the two of us, yes.

Q. Go ahead, sir.

A. And Ames Bishop walked in.

Q. Yes, sir.

A. Would you like me to tell the story? Is that what you want?

Q. Yes, sir.

A. Ames Bishop walked in, and I was angry at him. I told him that I thought that he had hit a new low in lowness by coming down to appear in front of the city council to testify as to Dailard's having the exclusive on bands in San Diego. I also told him it was a rotten

(Testimony of Larry Finley)

thing in calling Ralph Wonders of General Amusement and asking Ralph Wonders to come down and appear with him. I also told him that the lowest thing of them all was in calling Jack Flynn on the telephone a week previous to this time, and telling Jack that Dailard had been awarded the lease at Mission Beach, and that Flynn should write a letter to Dailard refuting his letter to me listing the bands. I told him that I wanted nothing to do with him, and I would rather run recorded music in my ballroom than buy from him personally; if I had to buy from him personally, I wouldn't buy it.

Q. Now, they must have said something. You have told us what you stated. [596]

A. Bishop said he was sorry, he did it to protect his client, it was the best client Music Corporation of America had on the Pacific Coast, that he would have done the same for me. And I remember using a word at the time. I said that, "In my estimation, that is larceny, and I don't like to be connected with any business in which there is larceny connected. I wouldn't want anybody to do that for me."

Q. Now, heretofore we have not had very much of a description of the Amusement Center and Ballroom. Will you briefly describe them both, please?

A. Mission Beach Amusement Center is located seven miles from downtown San Diego. It is served by three bus routes, with buses on the average of one every two or three minutes from the three runs; sometimes oftener than that. It is a park built at a cost of over \$5,000,000.00, comprises twenty and a quarter acres in its entirety, has parking facilities for around six or eight hundred cars, I don't recall offhand which. It is the

(Testimony of Larry Finley)

finest strip of beach land in the San Diego area. It has a very, very fine beach. The park itself consists of the amusement zone, the ballroom, and a large plunge. This plunge since the inception, since the war in the South Pacific, has been used to teach the Navy boys how to swim, and three and a half or four months ago the person in charge of the plunge told me they taught a million and a half boys there. [597]

Q. Is there a roller-skating rink there?

A. Yes, there is a roller-skating rink, roller-coaster, Ferris wheels. There is a complete amusement section. There are nine rides, and altogether over 100 concessions, including the food places and the various games and the rides. The rides section—

Q. I noticed some kiddie rides, and things like that?

A. Yes. We have just put in a complete kiddie playground, with a kiddie Ferris wheel and a kiddie automobile thing. We are putting in things for kids right now; trains, et cetera.

Q. Now, when you were awarded the lease, it was testified here, I believe that it was effective January 3rd; is that correct?

A. That's right. January 1st, it was supposed to be.

Q. All right. What did you do with reference to the Amusement Park after you took possession?

A. Well, we completely refurnished, I should say, the entire park. We ripped out miles of worn wiring around there that was creating a fire hazard. We completely rewired and we completely repainted the entire park. We raised—we had the sanitation expert out from the Navy, and we raised all of our stands one and a half inches and

(Testimony of Larry Finley)

two inches off of the ground, so that they could be flushed daily underneath to keep the dirt out. [598]

We put in a pest control system to take care of the rats that were out there.

We completely redecorated the ballroom, repainted it, refinished the floor, and rewired it. There are 108 overhead fixtures in the ballroom, and only 32 of them were in working order. We had to rewire every one, they had been so neglected, and so run down.

Q. How about your sound system?

A. We put in a complete new sound system, not only in the ballroom, but through the entire park. We put in a new stage setting. We built a new bandstand for a smaller band on the opposite side of the regular stand that was there. We put in a liquor checking stand.

Q. What does that mean?

A. Well, if these boys would come out on the bus not knowing there was no liquor permitted in the park,—they would come out with a half or a full bottle, we would have them check it at the entrance, and on the way out they could get it back.

Q. Was there any charge for that?

A. No, no charge for the liquor checking.

We put in—in the skating rink building we put in a new floor, and completely redecorated and repainted the skating rink. We installed a milk bar for children, and put in this kiddy train I am telling you about. [599]

We went around through the park and wherever it was dark,—there were a lot of dark spots through the park,

(Testimony of Larry Finley)

and we put in lighting there to make it safe for any one to walk there.

All and all, we went over it with a fine-tooth comb, and made a nice park out of it.

Q. That is right on the beach, isn't it?

A. Yes, it is.

Q. And the ballroom overlooks the beach, does it not?

A. That is correct.

Q. By the way, the weather does affect ballroom operations, doesn't it?

A. Yes, definitely it does, Mr. Christensen?

Q. Tell us about that.

A. Well, San Diego has very nice even temperatures, but we do have our rainy days and foggy days. When we are affected by rain, any ballroom is affected by rain. Then a lot of times we have fog at the beach, when there is no fog in town, and a lot of times there is fog in town when there is no fog on the beach. For example, New Year's Eve we were hit very badly by fog. You couldn't see your hand in front of your face, and it cut our attendance way down on New Year's Eve.

Q. That was true all through San Diego?

A. Yes, it was. [600]

Q. Let's go back to New Year's Day there. You put on a "Tournament of Music" on that occasion in San Diego, didn't you?

A. That's right.

Q. That was in Balboa Park?

A. That's right.

Q. You had two orchestras there?

A. That's right. [601]

(Testimony of Larry Finley)

Q. Which two orchestras, Stan Kenton and Charlie Barnet?

A. And Charlie Barnet, Lena Horn, the King Sisters and Woody. It was so foggy you couldn't see the stand from the seats, right from the seats right in the stadium.

Q. How many days a year do you have fog at the beach there?

A. You mean days or nights, Mr. Christensen?

Q. Nights, of course.

A. There is a great deal of difference. There is usually a fog in the morning. I should say that we have a fog that would interfere with business, oh, thirty to forty nights a year. I don't think it is any more than that; in fact, I think I am overestimating that when I say that.

Q. Could you tell me the number of days per year that there is such fog in San Diego proper?

A. Well, at Lindberg Field, which is on Pacific Highway, the weather department reported—

Mr. Doherty: Just a minute. That would be the best evidence. I object on that ground.

The Court: Yes; those records are available.

Mr. Christensen: Yes, I know.

Q. From your own observation, now?

A. Foggy days in San Diego—about 90.

Q. All right.

Q. Now then, let us go back here. You had told us [602] about your meeting there with Hal Howard. When did you next see Mr. Howard or Mr. Barnet or anybody connected with M. C. A., sir?

A. Well, I came up to—I say, I went up to M. C. A.

(Testimony of Larry Finley)

Q. When was that?

A. Oh, about a week after I got the lease at the Beach?

Q. Was that on or about November the 8th?

A. It was after that time, Mr. Christensen.

Q. I mean when you got the lease?

A. Yes; on November 8th the Beach lease was awarded.

Q. Now, you have told us it was about a week after that?

A. That's right.

Q. So that was along about the 15th of November?

A. Approximately the middle of November.

Q. All right. And you came up here from San Diego to the office of Music Corporation of America?

A. That is correct.

Q. And who did you see there?

A. I saw Mr. Howard and Mr. Barnet and also—

Q. Anyone else?

A. There were a lot of in and outers that day. I think, if I recall right, Lyle Thayer was in and out, and I think Mr. Bishop was in and out. I am not sure.

Q. Lyle Thayer is also— [603]

A. Vice president, I believe, of M. C. A.

Q. All right. Please tell me what was said and done on that occasion, sir?

A. Well, the first thing I did was get the Bishop situation off my chest to Mr. Barnet.

Q. Oh, no. Wait a minute. That won't help us a bit. I want you to relate what you said and what was done there.

A. Well, the same as I said before, Mr. Christensen. I told Mr. Barnet about Mr. Bishop coming down to

(Testimony of Larry Finley)

San Diego. I told him I was very much surprised that he would stoop to the lowness that he stooped to. It is the same story.

Q. Go ahead. What else was said and done, please, sir?

A. I told Mr. Barnet that now that I had the Beach, I would like to do something on the band situation; I would like to know where I would be so I could make my plans. I was in the middle of planning out the Park and refurbishing it and getting it set up the way I wanted to get it set up. And at that time he told me that—Mr. Barnet told me that they had a 10-year deal—

Q. I beg pardon?

A. Told me that they had a ten-year deal with Dailard; that it was not going to be easy to get bands for me. He told me he still was under the impression that I should have gone to Oakland instead of staying in San Diego, or that I should have taken the Casino deal. [604]

Q. Did he say anything about attorneys on that occasion?

A. No, he didn't. That was at a later meeting.

Q. I see. Go ahead.

A. He told me, though, that he was quite sure he would be able to work something out for me in the line of bands for San Diego. He said he hadn't had time; that, frankly, he didn't think I was going to get the lease; that he had been informed that Dailard was going to get it and it was quite a surprise to him when he learned that I got it. He patted me on the back and said, "Go home, my boy. Don't worry about a thing." I went home.

(Testimony of Larry Finley)

Q. By the way, your ballroom in the Park was closed until February the 3rd, I take it?

A. That is correct.

Q. That was the time you took in doing the redecorating?

A. Redecorating it.

Q. All right. Did you book any M. C. A. bands for the Trianon Ballroom?

A. I booked—are you asking did I book any M. C. A. bands?

Q. That is true.

A. I booked one M. C. A. band. It was not booked from them.

Q. Well, tell me about that.

A. Well on the occasion of my third visit to the M. C. A. [605] offices with Mr. Warner Austin—

Q. Well, all right; I had better lay a better foundation. When was that, sir?

A. I will tell you exactly. It was in the middle part of December?

Q. All right. And you say Mr. Warner Austin was with you?

A. Right.

Q. And who did you see there at M. C. A.?

A. First, we saw Hal Howard. We went into his office.

Q. Mr. Finley, you could help us if you could tell us what each one of you persons there said and did?

A. All right. We walked into Hal Howard's office, sat down, and I asked how things were coming with the band setup at Mission Beach; if he had heard anything. He said, no, he hadn't heard anything as yet but he would go in to Barnet with me.

(Testimony of Larry Finley)

At that time I was looking for a band to open at the Trianon just after New Year's Day. I told Hal that I wanted someone for the Trianon.

He said, "Larry, we have a very fine band here, very fine boys."

Q. Who said that? A. Hal Howard.

Q. Yes; go ahead. [606]

A. He said, "We have a very fine boy by the name of Paul Martin. He plays a great guitar. He has a fine band. It is a small band and an inexpensive band, and he would be a great band for the Trianon."

I told him I would like to get him.

He said, "Well, you know we can't sell you anything in San Diego. The only way you can get Paul Martin is to make a direct booking. I will give you his office number and you call him up."

I said, "Well, it is very silly. Why don't you call him up for me and make the arrangement?" I said, "Do you get the commission on this deal?"

He said, "Yes, we get a commission whether or not we book it."

I said, "Well, for the \$150.00 a week that M. C. A. is going to get for the six weeks, you can extend me the courtesy of calling him up, can't you?"

So he called Paul Martin and made the deal on the telephone to appear at the Trianon ballroom for six weeks.

After making the deal with Martin, he walked into Mr. Barnet's office with me and said, "Larry, I just made a deal—"

(Testimony of Larry Finley)

Q. "Larry," addressing Mr. Barnet?

A. Mr. Barnet. "I just made a deal with Paul Martin for the Trianon for six weeks at \$1500.00."

Q. A week? A. A week. [607]

Q. I beg your pardon. Go ahead.

A. Barnet looked up and said, "What are you going to do about the contract on it?"

Q. I beg pardon.

A. Barnet looked up and said, "What are you going to do about the contract on it?"

I said, "I don't know."

"Well," he says, "have you got an A. F. of M. form?"

Q. Mr. Barnet said?

A. Mr. Barnet said that, right. Howard said, "I imagine I can find one."

So Barnet told Howard, he said, "Now, don't make this out on an M. C. A. form because M. C. A. is not booking Paul Martin. Finley is making a direct booking."

Well, at the time—I mean I could see the way things were going, and I told Barnet that I would rather have it on an M. C. A. contract. I at least wanted to break in on the organization. So I told him that I wanted it on an M. C. A. contract.

He said, "I can't do it. If I do it, I am going to get into a lot of trouble with Dailard. You just let me handle the situation and everything is going to work all right for you."

So he instructed Howard to go out and get an A. F. of M. form, which Howard did. He brought in the contract and I [608] signed it.

(Testimony of Larry Finley)

Then I told Howard I wanted some pictures and some newspaper mats. You see, the offices supply pictures of the artists and newspaper mats for advertising purposes. And again, as Howard was on the way out the door, Mr. Barnet called him back and said, "Be sure you cut all mention of M. C. A. off of these pictures."

I remember at the time I told him, I said, "That isn't necessary. I will cut it off when it gets down to San Diego." And he said, "No. I want them cut off before they leave the office. I don't want any mention of M. C. A."

I said, "How about the newspaper mats; what are we going to do on that? That has 'M. C. A.' on it."

Mr. Barnet instructed Mr. Howard not to give me any newspaper mats unless "M. C. A." was scratched off. So I told him I was quite familiar with advertising newspaper work and that I would moisten the mat and push out the word "M. C. A." And he didn't seem to trust me on that, because I didn't take the mats with me. They were mailed to me and when I received them the mention of "M. C. A." was scratched off.

Q. You have told us all that occurred?

A. I was trying to think if there was anything else, Mr. Christensen. Well, there was more at that meeting but not in reference to Paul Martin.

Q. That was not the occasion when any conversation was had concerning any attorneys, I take it? [609]

A. No; King Sisters were at a later meeting. The attorney thing was brought up at that meeting, though.

Q. This particular thing you are telling us?

A. Yes.

(Testimony of Larry Finley)

Q. All right. Just directing your attention to that, please tell me what was said and done there about that?

A. While Mr. Howard was out cutting the word "M. C. A." off the pictures, I asked Mr. Barnet what was happening with the band situation for Mission Beach. I told him the time was getting close; that it was only six weeks off and I was really in a very bad spot; that I wanted to have a good opening and I wanted a good band.

So he told me that they had this deal with Dailard that he thought was outmoded. He told me at the time that when the contract was made with Dailard that San Diego was a very small city and at that time the city would not support two ballrooms, but now he felt it was large enough, and told me he would like to help me. And there was nothing he could do for me, however, until he took up the matter of the Dailard contract with the attorneys. And he said, "I am going to check into it with my attorneys to check the validity of it and see if we can't service you, because we want to help you." That was the time that he brought the attorneys into it.

Q. Yes. Now, what next occurred with reference to either the ballroom or—

A. Well, at that meeting I told him what [610] to tell his attorneys. I told him that he should tell the attorneys that here, in Los Angeles, there is the Trianon, the Palladium, the Casino Gardens, the Aragon; there is a dozen ballrooms here, all operating, and operating with M. C. A. bands, and certainly, in explaining the matter, that I should be given at least a 50-50 opportunity of taking all the M. C. A. bands and arranging their names in a hat, and I draw one and Mr. Dailard would draw one.

(Testimony of Larry Finley)

He said that he would check with the attorneys to see what could be done.

Q. You mentioned the Aragon ballroom. That is a ballroom down there at Ocean Park?

A. Yes, it is.

Q. Just one block from the Casino?

A. One block from Casino Gardens; that is correct; and both running M. C. A. bands.

Q. What was the next thing that you did with reference to the ballroom or with M. C. A.?

A. Well, I came up to Los Angeles; I believe it was the early part of January, and came in to see Mr. Barnet. Mr. Howard—I remember very definitely, at this meeting Mr. Thayer was present for quite a bit of the time.

I had better start myself at the beginning of the meeting if I am to give you the continuity on it.

We walked into Hal Howard's office, which was in a different office than Mr. Barnet's. Mr. Howard was then located in what was the audition room in the M. C. A. Building, and his desk was about 15 feet from Ken Later's. Howard was an orchestra—

Q. May I interrupt you? That is the Ken Later whose deposition has been read here?

A. That is right. Mr. Barnet was, I believe, at the barber shop and was delayed. So I sat there and talked to Mr. Howard for a while. During the conversation he introduced me to Ken Later and told Ken Later I was interested in two things from his department: one was the booking of outdoor attractions, such as an aerial attraction, and trapeze artists and people who jump off 100-foot poles into a bucket of water and things of that sort.

(Testimony of Larry Finley)

He also told him that it didn't look any too good for me so far as getting bands were concerned from M. C. A. and that none of the other agencies had any bands in California that they could serve me with.

And I told him that probably the only thing that I could do to get by would be to run a local or a semi-name band and throw an attraction in with it. I asked him what type of attractions M. C. A. had that they could offer me.

Well, on the free outdoor attractions, he advised me that he would let me know; that he would have to check into the bookings; that he didn't have any listings on it, but he [612] took out a list from his desk and I went over it with him and I selected—oh, a dozen or fifteen people that I wanted him to check on to see if they would be available for Mission Beach.

There was Frankie Sinatra, I remember, that we had; there was Lily Pons, and Andre Castellanas; Laurel & Hardy. I believe there was Bily Gilbert, Bonita Granville, of course, the King Sisters. Who else, offhand, I don't recall all of the people that I told him I was interested in. So he went over the list with me and said that he would see me before I left the building and get back to me as far as telling me what the prices were and everything.

Just about that time Mr. Barnet came in, and Mr. Billy McDonald was present with me at that meeting. Billy McDonald, myself, Mr. Howard, and Mr. Later walked into Mr. Barnet's office, and Later told Barnet what I was interested in; said he was going to do some checking on it; that he couldn't let me go until he saw me on the thing.

(Testimony of Larry Finley)

Q. That is to say, Mr. Barnet should not let you go until after Mr. Later had checked it?

A. That is right; that I was interested in attractions.

Q. All right; go ahead.

A. At that time, Lyle Thayer either walked in or was called in—I don't recall—and sat down. And I told Thayer what my idea was. I told him that I knew I couldn't get bands and it didn't look as though I was going to get any; [613] that I thought the policy of running attractions would be the thing. He advised me that I was wrong about attractions, and he was 100 per cent right. He told me it would not pay off. People go to a ballroom, they want to dance. He said he didn't think the attraction policy was the proper policy for it.

Well, Mr. Thayer left the office, Mr. Howard left, I believe, too. It left Mr. McDonald and Mr. Barnet and myself.

I asked Barnet if he had heard from the attorneys. I was getting anxious to know. And he said, no, he hadn't. He hadn't heard anything. He says, "It is a little too early." I didn't give him enough time.

So I explained to him that I didn't have much time. I had to have something. I still did not have a band booked for my opening weekend. I did, however, have an attraction booked for the opening weekend, but not a band.

Q. What attraction is that?

A. They are Ella Mae Morris and Allan Jones. But people can't dance in a ballroom to two singers and I needed a band pretty badly.

So I told Mr. Barnet that I was in an awful spot. I had to have something. So he turned around to his file

(Testimony of Larry Finley)

and he pulled out a list of names of bands from his file. And he said, "Well, let's see what is here." He appeared to go down the file and, as he did, I got up and walked around his [614] back to look over his shoulder and look at a list of the names. And I remember Jan Garber's name to be on the list. I said, "How about Garber? I understand he is in town."

He said, "No. He is going to play the Square."

"How about Harry James?"

"Well, he is going to play the Square."

I says, "What is this thing? Are they all going to play the Square a month, six months, or a year off?"

He said, "Well, that might be, but they are going to play the Square."

Well, then the thing hit me that I was really in bad condition. So he couldn't do anything for me. I still had a little—I just had a hunch that maybe I would be able to get together with him, so we went out to lunch.

Q. That is to say, you and Mr. Barnet, and who else was there?

A. Well, there was McDonald, Barnet, myself, Howard or—yes, I believe it was Hal Howard. We went to lunch that day. We went to the Copper Kettle.

Q. That is a little restaurant—

A. We sat there talking. That is right. While we were talking there Mr. Barnet told me—I asked Barnet about Harry Owens, because Harry Owens had done a very fine job at Mission Beach, got a few locals in it, got a percentage and got a lot of money there, and people liked him.

(Testimony of Larry Finley)

Q. When did Harry Owens play there? [615]

A. He played two days before I took the place over, New Year's—a week long he played.

Q. I see. Go ahead.

A. I asked Barnet if he could get me Harry Owens. He said he couldn't make a booking for me on it but I could book him direct; that he would give me Harry Owens' phone number at home, which he did. He was very nice to me. He gave me the number. I called up Mr. Owens and Owens told me—

Q. You can't give the conversation.

A. I beg pardon. I am sorry.

Q. So you did not get him?

A. I did not get him.

Q. All right.

A. On the way over to the Copper Kettle we were talking about various bands, and Mr. Barnet told me that I could make these direct bookings with the bands. I asked him how I could make a direct booking, and he said, "Well, you have to go to where that band is."

I said, "Right now Tommy Dorsey is in New York. Would I have to go to New York to direct book Tommy Dorsey?"

He said, "Yes."

I said, "Where is"—I forget—"Bobby Sherwood?"

Anyway, I would have had to have gone all over the world to make my direct bookings of these bands. I knew Jan Garber was in Los Angeles. I asked him about Garber. He said, [616] yes, sure I would have to go over there to Garber and make my direct booking; that he had just played the Square and he couldn't book him for me, but I could go and talk with Garber myself.

(Testimony of Larry Finley)

Just as we had completed our lunch at the Copper Kettle and were on our way out of the restaurant, who in the world but Jan Garber was coming in? I told him I am going over and speak to him and book him right now. He says, "No, don't do it." He said, "You will spoil everything if you do."

I said, "Well, why?" I remember him telling me that he had a special reason for not wanting me to book Garber. We got back to the office and Ken Later came in. He said that he could get me the King Sisters and Bonita Granville for \$2500.00 for the weekend of February 10th and 11th, which was my second weekend. I told him that \$2500.00 was a little high; that I didn't want to spend that much money. I didn't want to chisel any prices with him; that we were on the job for Bonita Granville and the King Sisters, but we thought they would be a good bet at \$1500.00.

Mr. McDonald, who was with me at the time, asked me if \$1500.00 for two days was a lot of money for the King Sisters. I told him I thought it was but we wanted them because I thought they would mean something down there and they hadn't played in San Diego since they became an attraction on their own. [617]

So we talked a while and he said that he would call and contact King Sisters to see if they wanted to play the date; that they had to accept the date first, and if they wanted to accept, if it was O.K. with me and it was O.K. with them.

I said, "You call the King Sisters and tell them that I wanted them. We will make it nice for them down there. You send me the contracts and I will sign them." And Later walked out of the office. That is substantially

(Testimony of Larry Finley)

all of the conversation, as much as I remember. You see, that is over a year ago, Mr. Christensen.

Q. When did you find that you were not going to get the King Sisters?

A. I didn't find out for a while. I called Later the next day and he told me they had contacted one of the King Sisters and they had accepted the booking and the contracts would be in the mail. I waited a day, the contracts were not in the mail, and called up Later, again. I said, "Where are the contracts?"

He said, "Larry, they should be in the mail. I don't understand it. They are tied up between our legal department and our auditing department or something like that." This went on for three or four days and no contract. [618]

The next thing I knew is after I had instructed my art department to make out some layouts on the King Sisters coming the second week-end, I picked up a newspaper and I read where they were booked into Pacific Square one week previous to the time that I had booked them. That is, they booked them just one week prior to the time I had O.K.ed, and he had O.K.ed it verbally.

Q. Now, let's go back for a minute. You had the Henry Busse band for your opening?

A. That's right.

Q. Tell me, how did you do that?

A. Well, General Amusement had no name bands in the Los Angeles or San Diego area. Frederick Brothers had no name bands—period. Music Corporation, of course. I called Jack Flynn at the William Morris Agency, and I explained to him the spot I was in for a band for the opening, and he told me that the only

(Testimony of Larry Finley)

possibility that there might be would be to get Henry Busse; he didn't think—he thought that was a very remote possibility, because Busse had this terrible skin condition at the time, and the doctor told him he had to take a vacation. I told Flynn that for the opening I didn't care what the price was, that I had to have a band, that I was putting everything I had into the Beach deal, both financially, and morally, and physically, and everything, and I said, "The thing has got to be a success. You have to get [619] Busse for me." He called me back—

Q. You then made direct negotiations, did you, or did Mr. McDonald, or somebody else?

A. No. It was a funny story. Mr. Flynn didn't seem to do all he might have in booking the band. Of course, at that time Vaughn Monroe, another William Morris band, was at the Square that week-end. But Ralph Wonders, whom I particularly got friendly with, he was in Frisco at the Palace Hotel where Busse was playing, and he talked to Busse and induced him to play the date. Of course, I had to pay a terrific fee to get him.

Q. What do you mean by that?

A. I paid him \$2,750.00 for a two-day engagement. That Mr. Busse told me was the greatest—

Mr. Doherty: Just a minute.

Mr. Christensen: That, of course, would be hearsay. As a matter of fact, Mr. Doherty has been very generous.

(Testimony of Larry Finley)

Q. By Mr. Christensen: Now, he played there for two days, and who followed then?

A. I was just running week-ends at the time, Mr. Christensen. I embarked upon a policy of Saturday and Sunday engagements until the middle of May, when we went on a six-night-a-week basis until Labor Day, and then back to two-night-a-week engagements.

Q. Now, from the time that you spoke there with Mr. [620] Barnet on the occasion you have told us about at the M. C. A. office, when did you next see anybody from M. C. A.

A. See or talk to any one, Mr. Christensen?

Q. Well, did you talk to them? I don't mean just passing, of course, sir.

A. I was at the office of Reg Marshall one afternoon, and I called Mr. Barnet on the phone. I mean, I had gone around to every agent to see what was available. I called Mr. Barnet on the phone and I asked him—I still had a little bit of hope that maybe a talk to his attorneys would help, and so I asked him on the phone if he had talked to his attorneys, and he said, "No."

I told him, "Larry, we have been messing around with this thing for five or six months. If I can't get any satisfaction out of you on an amenable basis, I am going to see my attorney to see if you can't be forced to give me bands.

Mr. Doherty: Would you fix the dates, please?

Q. By Mr. Christensen: You told us about the telephone call, the fact that it was over the phone, but you haven't told us when it occurred, sir.

A. It was in February. I am sorry, but I can't give you the exact day.

(Testimony of Larry Finley)

Q. Of 1945?

A. That's right.

Q. What next occurred with reference to this matter? [621]

A. Mr. Barnet told me that I was crazy, I would never do anything like that.

Q. That is a part of this same telephone conversation?

A. Yes.

Q. I am sorry. Tell me all the conversation, sir?

A. I didn't know you wanted me to. I am sorry.

He said, "You are insane if you do anything like that. That is going to get you nowheres."

I asked him how I was going to get bands. He said, "All I can tell you is that if you see your attorney, it won't get you nowheres."

I told him I was going to sue him under the provisions of the Sherman Anti-Trust Act, and he said, "You can't do any such thing." And the argument became a little heated on it, and I shut off, and I went down to see my attorney. I explained the thing to my attorney. I said, "There must be a law to see"—

Q. In other words, you discussed the matter with Mr. Arthur Desser, I believe?

A. That's right.

Q. After that what next happened?

A. Mr. Desser notified Mr. Joe Ross—well, he was one of the attorneys representing M. C. A., and they being in the same building, that is, Desser, Rau & Christensen and Pacht, Pelton, Warne, Ross & Bernhard being in the same [622] building. Mr. Desser told me he knew Joe Ross,—

(Testimony of Larry Finley)

Q. All right, he told you he knew him. After that don't give any more of that conversation.

A. All right.

Q. What did you do next?

A. We went—I went to see Mr. Ross with Mr. Desser.

Q. Was anybody else present besides you, Mr. Desser, and Mr. Ross?

A. No, that's all.

Q. Please tell us what occurred there.

A. Well, I told Mr. Ross of the running around I had been getting at M. C. A. I told him the incident of the King Sisters booking.

“Larry,” he said, “that is hard to believe.”

I said, “Well, it actually happened.”

He said, “I am going to check it.” and he says, “By gosh, if it is true, I am going to do something for you. I will see that something is done.”

He told me that Ames Bishop and Wayne Dailard were very, very close friends. He said he didn't know if there was a tie-up there or not. He said, “However, I am very sympathetic to you in your problem down there, and I am going to intercede in the matter. I don't believe you will have to take it into court. I will intercede in the matter and see if we can't get you some bands.” And he told me he would contact [623] my attorney.

Q. That is to say, he would call Mr. Desser?

A. That is correct.

Q. Well, did you later talk with Mr. Ross?

A. I talked to him in New York after we had filed the action. He never called Mr. Desser back. I under-

(Testimony of Larry Finley)

stand from Mr. Desser, however, that Mr. Desser called him.

Q. Well, you can't give us that. Did you talk again with anybody from M. C. A. before filing the action?

A. Yes, I received a telephone call from Hal Howard or Ames Bishop, I don't remember which, I think it was Hal Howard, offering me Jack Teagarden and his orchestra at a price of \$2,250.00 against 50 per cent.

Q. Could you tell me when that occurred, sir?

A. About three days after I talked with Mr. Ross.

Q. I see.

A. They offered me three bands, Mr. Christensen. I don't recall if it was a telephone conversation or a letter, but I know they offered me Jack Teagarden and his orchestra at a price of \$2,250.00 against 50 per cent; Bob Chester at, I think it was, \$2,250.00 against 50 per cent; and Ted FioRito at \$2,500.00 against 50 per cent.

Q. What did you tell them?

A. Well, I told—yes, it was a telephone conversation. I remember now. I remember discussing it now with [624] Mr. Howard, because I told Mr. Howard that both Jack Teagarden and Ames Bishop—correction. I am sorry—both Jack Teagarden and Bob Chester had played together, both bands, at Pacific Square three or four days before this conversation, and in the music business we call it a "turkey," it was a very, very bad engagement. We did fairly well that week-end out at the Beach because a lot of the kids left the Square and came out to our place. Both bands were not good, and I couldn't see running a half of what was an attraction at the Square. In other words, I wouldn't run Jack Teagarden alone

(Testimony of Larry Finley)

if the week before Teagarden and Chester both were at the Square.

On the Ted FioRito thing, I told him I was very much interested in FioRito, but I wouldn't want to be held up on the price of it. In other words, they quoted me the same price for two days at Mission Beach as they had been quoting for three days at Pacific Square. Pacific Square ran three nights, Friday, Saturday and Sunday, and we were running only two nights, and I told him if he would adjust the price and charge me for two nights, I would book Ted FioRito. In fact, I told him I would be glad to have him, but I wouldn't play the sucker and pay him the same for two nights as my competitor paid him for playing three nights.

Q. What did he say?

A. He said it couldn't be done, that it was the same [625] price for a two or three-night engagement. I told him I couldn't see it that way.

Q. Now, how many name bands did you have at Mission Beach during the year 1945?

Mr. Doherty: Just a minute. That would be a conclusion unless the witness qualifies himself as to what he defines it to be.

Mr. Christensen: I think you are perfectly right, Mr. Doherty. I withdraw the question.

Mr. Doherty: I think we ought to have the additional definition, your Honor.

Mr. Christensen: Will you now, please, tell me if you know what a name band is?

A. A name band is a group of musicians who have achieved national popularity through the use of radio, or records, or motion pictures, or transcriptions; a band that

(Testimony of Larry Finley)

is known equally in all parts of the country, and mainly a band whose popularity—

Q. You don't mean equally, do you, Mr. Finley?

Mr. Doherty: Let the witness testify a little bit.

Q. By Mr. Christensen: Go ahead.

A. I am sorry. I was interrupted by Mr. Christensen, and will you read the last part?

(The answer was read.)

A. I would leave the word "equal" in there. And mainly [626] a band whose popularity has the assurance of good business or extra business at a box office in a ballroom—a band that the kids—not necessarily kids—that people like to dance to and would pay money to listen to them and dance to them. That is my definition of a name band.

Q. How many bands, then, did you have at Mission Beach during the year 1945?

A. Seven. Seven or eight; I think seven.

Q. Can you remember what bands they were?

A. Yes. There was Henry Busse that played February 3rd and 4th. Frankie Carle played a four-week engagement starting May 11th; that is four weeks at six nights per week. Tony Pastor came immediately after Franke Carle; four weeks at six nights per week. Tommy Dorsey, two weeks of six nights per week. Jimmy Dorsey, two weeks of six nights per week. Glen Gray, four weeks on six nights per week. Charlie Barnet, four nights, December 28th, 29th, 30th and 31st. Stan Kenton, one night, December 31st; that was New Year's Eve.

(Testimony of Larry Finley)

Q. You used both Stan Kenton and Charlie Barnet in your Tournament of Music?

A. Yes. I booked the two of them for the Tournament of Music with the provision they would play that night out at Mission Beach.

Q. I see. I notice some of those engagements were [627] for four weeks. Is that the policy of booking them, for four weeks, sir?

A. That depends, Mr. Christensen, a great deal upon your locale, and what your competition may be. I had a band in there every night for 24 nights straight, while my competition was changing bands every week or every two weeks. My opinion would be for engagements of no more than two weeks in the summertime. That is what my competition did. They would run a band for one week-end or two week-ends. At the time the policy I had was not the policy I wanted. It was the policy I had to have because I couldn't get the bands to cut it down to two weeks.

Q. What did you do about bands other than those you have named to us? I mean, besides the names bands you have mentioned, what did you do?

A. Well, I have used organized semi-name bands. I came up to Los Angeles and got a leader and got a band together for him so that he would be able to fill the time for me. I have used local bands down there. With the exception of the names bands I have mentioned, and three or four others of semi-name bands we have had very poor music down there. It hasn't been good.

Q. All right. Now, you had these name bands. How did you get them? Let's start with, say, Tommy Dorsey. How did you arrange to get him? [628]

(Testimony of Larry Finley)

A. Tommy Dorsey was a fluke booking. It was—I would rather start with Jimmy Dorsey, if I may, because it goes back. Tommy goes back to Jimmy.

Q. All right.

A. I went back to New York to the General Amusement office and arranged to book Jimmy Dorsey as what I thought would be the top name band of the year, and send him in for a two-week period of time. I went back to New York, oh, I think it was a month after the Jimmy Dorsey booking, and I called a few people I knew, friends of mine in the business. I had not known Tommy Dorsey, I never knew the man, and I asked them if they could please—

Mr. Doherty: Just a minute. That is objected to as hearsay, and incompetent, irrelevant and immaterial.

Mr. Christensen: You are perfectly right, Mr. Doherty.

Q. By Mr. Christensen: You inquired there concerning Mr. Dorsey, Tommy Dorsey, is that right?

A. I inquired about Mr. Dorsey and a meeting was arranged with Mr. Michaud, who is Mr. Dorsey's personal manager, and Mr. Lee Eastman, who is Mr. Dorsey's attorney. They knew I had Jimmy booked, and I asked them about booking Tommy for a two weeks engagement.

Q. All right. Now, stop with your conversation except for the fact you arranged to book Tommy Dorsey. Is that right?

A. That is correct. [629]

Q. Who prepared the contract, sir?

A. The M. C. A. office in Los Angeles prepared it, although it wasn't booked through them, Mr. Christensen.

(Testimony of Larry Finley)

Q. Did you talk with anybody connected with M. C. A. concerning this booking and drawing the contract?

A. Yes. The first I heard from any one at M. C. A. was, I think, Ames Bishop called me at the hotel.

Q. When was that, sir? A. In May.

Q. At what hotel?

A. I was staying at the Beverly Wilshire at the time.

Q. All right.

A. Ames Bishop called me on the phone and said, "I have the Tommy Dorsey contracts ready for you to sign, Larry."

I said, "Why isn't it made out on an A. F. of M. form. I booked Dorsey direct. It is a parallel case to Paul Martin."

He said, "This is the way the contract has to be." I said, "All right, bring the contract over." I waited, and I missed him. However, later he called at the hotel, or, I forget, I either came back or I went to the M. C. A. office to sign the contract, the Tommy Dorsey contract.

Q. Now, you played him at Mission Beach. What was the result?

A. Very good. I played Tommy for two weeks, which was [630] just the right time for him. He went in at what he told me was the highest figure he ever got, a guarantee of \$10,000 a week against 55 per cent.

Q. You mean you pay an orchestra leader 55 per cent?

A. I pay the orchestra 55 per cent.

Q. Go ahead.

A. The first week he was there—

The Court: Explain that so that the jury will understand it. They may not be familiar with these technical terms.

(Testimony of Larry Finley)

The Witness: I am sorry, your Honor. We guarantee in some cases to an orchestra a flat sum of money against a percentage. In other words, we may guarantee an orchestra \$3,000.00 against 60 per cent, and if we do \$10,000.00 worth of business in the time they are there, the 60 per cent amounts to \$6,000.00, and so they get the \$6,000.00 instead of \$3,000.00.

Q. By Mr. Christensen: In other words, it is a minimum guarantee?

A. A minimum guarantee of \$10,000.00 per week against 55 per cent, which means that if 55 per cent of our total business is greater than \$10,000.00, then he would receive the greater amount. If he came in and he did \$2,000.00 worth of business for the entire week, we would still have to pay him \$10,000.00, however.

Q. But you say that was quite profitable? [631]

A. Yes, it was. He went in at a lower percentage. We made it 55 per cent, which was 5 per cent lower than when he played there before at Pacific Square. His usual percentage was 60 per cent.

Q. Now, with reference to these other name bands, how did you do with them?

A. I did very well with Jimmy Dorsey. He also went in at a percentage of 55 per cent. He was there for two weeks. His price was \$7,500.00 a week against 55 per cent. Of course, you understand the reason for the 5 per cent less, Mr. Christensen, was the fact, they were my partners in another enterprise. Jimmy Dorsey did very well there in his two-week engagement.

Q. All right. Now, how about the other name bands that you played?

(Testimony of Larry Finley)

A. Well, Frankie Carle lost money on us. He was there too long, for four weeks. We had a couple of weeks we did fairly well. We had fair opening weeks on them, and the last two weeks were very bad.

With Tony Pastor we did good business the first couple of weeks, and then it fell off. The same with Glen Gray. Four weeks was just too long to run a man.

Q. What attractions were being played against you down there at Pacific Square during those times?

A. Well, top name bands, changed weekly and every two [632] weeks.

Q. Now, you have told us about going back to New York.

The Court: Mr. Christensen, I think we will suspend now.

Mr. Christensen: Very well. I will withdraw what I started.

The Court: We find that we have matters that will occupy us this afternoon, so we will not have any session in this case this afternoon, but we will have a session tomorrow, and during all of the usual hours tomorrow. On Wednesday it will be necessary to empanel a new Grand Jury, so that probably we will not convene on Wednesday morning until about 10:30, the same as we did this morning.

Ladies and gentlemen, we will take a recess until 10:00 o'clock tomorrow morning. Remember the admonition in the meantime, and keep its terms inviolate. Be here in the morning at 10:00 o'clock.

(Whereupon, at 12:10 o'clock p. m., Monday, February 4, 1946, an adjournment was taken until 10:00 o'clock a. m., Tuesday, February 5, 1946.) [633]

Los Angeles, California, Tuesday, February 5, 1946.
10:00 a. m.

The Court: All present. Proceed.

LARRY FINLEY,

called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

Mr. Warne: If the Court please, at 11:00 Mr. Stein has to leave to attend a funeral, so that will explain his absence.

By Mr. Christensen:

Q. Mr. Finley, you have invited my attention to page 608 of the transcript, which has to do with the conversation concerning the booking of the Paul Martin band—I beg your pardon—of the King Sisters, and in that you said that “Barnet looked up,” reading from line 5, “and said, ‘What are you going to do about the contract on it?’ ” And you replied, “I said, ‘I don’t know.’ ” Is that correct, sir?

A. I don’t believe it is, Mr. Christensen.

Q. What actually happened there?

A. It might have been Mr. Howard said that he didn’t know. I believe that is the way I told it.

Q. Is that the fact?

A. Yes, I would say it is.

Q. At the time that we took the afternoon recess, I had just asked you concerning the trips to New York for the purpose [635] of booking bands.

A. Yes.

(Testimony of Larry Finley)

Q. You did go to New York for that purpose, did you, sir.

A. Yes, I made several trips to New York for the purpose of booking bands.

Q. And the first time, sir?

A. The first time was the time that I booked Jimmy Dorsey.

Q. Can you fix the dates for us, please?

A. It was during the middle part of March.

Q. Of the year 1945? A. Right.

Q. What did you do?

A. I talked to Jimmy Dorsey and his personal manager, and arranged to have them appear at Mission Beach.

Q. Did that entail any expense on your part, the trip?

A. Yes, it did. There was quite a bit of expense attached to it.

Q. Could you tell me approximately?

A. Oh, in the neighborhood of \$1500.00, I would say.

Q. Then did you make a subsequent trip, or, you have already told me that you did. When was your next trip to New York, that is to say, for booking bands direct?

A. The next trip I made was possibly 30 or 45 days later. [636] I don't recall exactly when I went back. It was for the purpose of booking Tommy Dorsey.

Q. That would be, then, in April or the early part of May?

A. It was. I recall now, Mr. Christensen. It was just prior to the time I entered into the partnership with the Dorseys, so it was the latter part of April and the first part of May that I made the trips for booking the Dorseys.

(Testimony of Larry Finley)

Q. Tell me what was done on that occasion, sir; what you did, of course.

A. I had a mutual friend arrange a meeting with Mr. Dorsey's personal manager, Arthur Michaud.

Q. That is Tommy Dorsey, is it?

A. That's right. And I met with Mr. Michaud and Mr. Dorsey's attorney, Mr. Eastman, and arranged for the booking at Mission Beach. That was the time that they asked me if I wouldn't be interested in taking over the Casino Gardens, incidentally.

Q. Now, that, too, entailed some expense on your part, did it?

A. Yes, there was quite a bit of expense attached to that. That was \$2,000.00. I recall it.

Q. Now, the next trip you made?

A. The next trip I made was, I think it was, the time that I made a direct booking with Charlie Barnet. [637]

Q. When was that, sir?

A. I don't recall the date, Mr. Christensen.

Q. Your best memory of it, sir?

A. Well, it might have been in July or August.

Q. In any event, after the Tommy Dorsey booking?

A. That's right.

Q. I use the words, "Tommy Dorsey." Is that right? Did you book both Tommy and Jimmy at that time?

A. Yes, that is right. On the Barnet booking I went back for a twofold purpose. We couldn't get together on the dates that—or, the terms that he was to play at the Casino Gardens here. You see, I asked M. C. A. to supply him for the Casino Gardens, and there was some difficulty; I don't recall exactly if it was because of the radio wire trouble that Barnet was afraid of, or if it was

(Testimony of Larry Finley)

for the fact that we couldn't get together on the finances, but we needed Barnet's band to open at a certain date, and M. C. A.'s office advised me that they were contacting him and going back and forth with Barnet, and at the same time nothing was happening, and I wanted to talk to him about playing at Mission Beach.

Q. Now, you said about your contact there with the M. C. A. office concerning this matter, and they are entitled to a little better foundation than just that. So tell me with whom you spoke, and when it was, approximately.

A. My dealings on Charlie Barnet for the Casino Gardens were with Hal Howard. [638]

Q. And the date, please?

A. I am trying to recall, Mr. Christensen. I do not recall the date. Let's see; Glen Gray followed Jimmy Dorsey, and Charlie Barnet opened right after Glen Gray. I think that was—I think it was in October. I believe I talked to him in New York in September.

Q. That, too entailed some expense on your part?

A. Yes.

Mr. Doherty: May it be understood, your Honor, in all the testimony of this witness or other witnesses—or this particular witness, because we only have him before us, in the matter of any expenses or monies or damages subsequent to the filing of the suit is incompetent, irrelevant and immaterial, without the issues of the case, and not a basis of damages, and speculative and guesswork.

The Court: May it be so understood, and the objection is overruled, subject to modifying the ruling later on if deemed proper.

(Testimony of Larry Finley)

Mr. Christensen: You had answered that question, had you, sir?

The Witness: I am sorry. My mind was taken off the trend of the talk. May I have the question? Can we go back a little bit?

(Question and answer read by the reporter.)

Q. By Mr. Christensen: Could you tell me approximately? [639]

A. Well, it costs a lot of money to entertain band leaders when you are talking to them about playing at Mission Beach, especially an M. C. A. band. I would say, offhand, in the neighborhood of \$2,000 for the job.

Q. Mr. Finley, why didn't you book more M. C. A. bands direct?

Mr. Doherty: Just a minute. That calls for his conclusion and argumentative, why he did not.

The Court: Overruled.

A. Frankly, I could not afford it, Mr. Christensen. My bank account was going down and it is too expensive a proposition to go out and book a band for one or two weekends, an expense of \$2,000 every time you want to book them, and it just wasn't good business to do it.

Q. Tell me why didn't you get bands from General Amusement Corporation then?

A. Well, they did not have them to serve me with.

Q. Why didn't you get them from one of the other agencies, then, such as William Morris or the Frederick Bros.?

A. I exhausted every agency for name bands and there were just none out here on the Coast at that particular time, or all the bands on the Coast were M. C. A. bands.

(Testimony of Larry Finley)

There were none here from William Morris, General Amusement or Frederick Bros.

Mr. Doherty: Will you please have the witness specify [640] what period that was?

Mr. Christensen: Yes.

Q. Please, Mr. Finley, will you tell me what period you were talking about there?

A. Well, you see—may I explain the situation, your Honor?

Mr. Doherty: Answer the question.

Mr. Christensen: Just tell me the period you are talking about.

A. The period was from September until January.

Q. Of what year?

A. Of 1945, and other months throughout the year.

The Court: Well, that is not specific.

Mr. Christensen: That does not help.

The Court: You made it specific first and then you made it general.

A. I am sorry. From September until January.

Q. By Mr. Christensen: You have already told us about going back as early as March of 1945.

A. Well, at that time, from the first week in January until May 11th, the time that I had Frankie Carl at Mission Beach, there were no bands available for me.

Q. Do you mean from—

A. G. A. C. or William Morris. Then, from Labor Day until the first of January of 1945 there were no name bands avail- [641] able for me. Then, for a two-week period in—I believe it was July, there were no bands available from any other agency.

(Testimony of Larry Finley)

Q. You mean except from M. C. A.?

A. That is right.

Q. You told us yesterday about your difficulty in getting a name band for your opening. Will you tell me why you did not get one from G. A. C.? That would be in February of 1945, sir?

A. General Amusement had no one out here. The first band, as I told you, was Frankie Carl, who was available in May.

Q. So that, is this correct, then: Except for your opening, when you used Henry Busse, you had no name band until May of 1945, when you had then Frankie Carl?

A. Right; until May 11th.

Q. Mr. Finley, did that have any effect upon the successful operation of the Mission Beach ballroom?

Mr. Doherty: Just a minute. I object on the ground it is incompetent, irrelevant and immaterial, hearsay, a conclusion of the witness, not a proper basis for expert testimony or opinion evidence.

The Court: Well, I think the way it is phrased it is objectionable. It does not give the jury any factual basis.

Mr. Christensen: I will withdraw the question. [642]

The Court: Sustained.

Q. By Mr. Christensen: Mr. Finley, you have told us there of the difficulty in obtaining bands?

A. Yes, sir.

Q. You have told us that you finally did get Henry Busse for the opening; and he played for a period of how long, sir?

A. Two days.

Q. Two days. And that thereafter you did not have any name bands play at Mission Beach ballroom until May the 11th, 1945?

A. That is correct.

(Testimony of Larry Finley)

Q. During which period of time you used what bands?

A. Well, I used some semi-name bands that played at Mission Beach for the weekend, the two-day weekend, before going into the Trianon downtown. Other than that, I would book into the Trianon for four weeks and would play the two-day engagement at Mission Beach to fill me over. I used one particular band, Wingy Ma-none, a trumpet player that didn't even have a band. He got a group of musicians together up here and he would come down and play. I got whatever music I was able to, Mr. Christensen, and most of it was not good.

Q. Then, did the fact that you had such bands, in your opinion, have any effect upon Mission Beach ball-room as [643] a ballroom, as a Class A ballroom?

Mr. Doherty: Just a minute. The same objection, your Honor; on the further ground that no foundation laid, and speculative, guesswork, not the basis of any element of damages.

The Court: That is the same question. He ought to be able to give specific factual data rather than his opinion.

Mr. Christensen: All right.

Q. Can you tell us specifically what, if any, effect that had upon the successful operation of Misison Beach ball-room?

A. Well, perhaps the best example that I can give you specifically is the profit and loss sheet, Mr. Christensen, for a Class A ballroom the same as Pacific Square, that were running name bands; and we went from bad to worse along with the bad music that we had. Dancing being a habit, people get in the habit of going places, and they

(Testimony of Larry Finley)

certainly did not make a habit out of coming to the Beach with the type of music that we presented.

Mr. Doherty: I move the answer be stricken as not complying with the court's admonition to give a specific instance, a conclusion of the witness and argumentative.

The Court: The latter portion of the answer, ladies and gentlemen, will be stricken. The first of it will stand, the comparison between the two ballrooms; but the opinion with [644] respect to what probably would happen will go out and be disregarded.

Q. By Mr. Christensen: Have you through the operation of your Trianon ballroom and the Casino Gardens had an opportunity to observe if, generally speaking, it is the same persons who come regularly to a ballroom?

A. Yes, it is. I can give you specific instances of that if you would like.

Q. Well, perhaps it would be illuminating.

A. Well, here at the Casino Gardens, Mr. Cohen, who was acting as resident manager, pointed out people to me and introduced me to people that had been coming every Saturday night for the past 15 or 16 years. The same condition holds true at the Trianon. The man that I bought it from, Mr. Ratliff, would come up some evenings and introduce me to people that had been coming up the same nights for a great many years, as many as 20 years. And they all seemed to get the habit of going to a certain place on a certain night. And I have observed it in both places.

Q. I do not believe you have told us as to the capacity of Mission Beach ballroom, sir.

A. Mission Beach ballroom consists of 32,000 square feet. It is a Class A structure that can accommodate as

(Testimony of Larry Finley)

many as 6,500 or 7,000 people. Now, that does not mean 6,500 or 7,000 admissions to the boxoffice. It means much more than [645] that; for example, that is in a ballroom that is located in the center of an amusement park and there is a pass out system. When people come in we stamp their hand, and that entitles them to go in and out at will; and there are always as many people going out and visiting the park, buying their hot dogs and soft drinks, and playing the games and riding the rides as there are coming into the door. So it is pretty hard to state as to how many people—what the capacity is, Mr. Christensen, except I might tell you that the Amphibious Training Base at Coronado, that is the Naval station there, advised me that one night—

Mr. Doherty: Just a minute.

Mr. Christensen: That would be hearsay.

The Witness: I am sorry, sir.

Mr. Christensen: You will have to testify to your own observations, your own knowledge, sir.

A. Over 8,000 people have been in the ballroom in one night.

Q. Do you know the number of name bands, M. C. A. name bands, that were available here in San Diego area during the year 1945, available for playing here in the San Diego area during the year 1945?

The Court: That calls for a yes or no answer.

Mr. Doherty: Certainly, your Honor, it calls for a conclusion and opinion as to what was available. [646]

The Court: No; it doesn't. It calls for a definite answer yes or no, categorically, first.

A. The answer is no, Mr. Christensen.

(Testimony of Larry Finley)

Q. By Mr. Christensen: Are you familiar with the manner by which bands are made available to ballroom operators in and about the Los Angeles and San Diego areas? A. Yes.

Q. Will you explain?

A. Well, in the San Diego area, for example, the usual thing that happens is this: M. C. A., G. A. C., the Frederick Brothers, or the other agency, William Morris, brings a band out to play.

Q. Brings a band out, that is from some place?

A. Some place in the East. I might change it, if I may, and explain that this way: The band is in the East and is booked into a key spot. With M. C. A. the key spot might be the Palladium, the Casino Gardens, the Aragon, or the Trianon ballroom in Los Angeles, or it might be for the purpose of making a motion picture. Usually, before a band goes into one of these spots for their engagement, they are brought out one or two weeks in advance of this time, at which time they are available to play in the San Diego area. Then, at the conclusion of their Los Angeles engagement, they can either play San Diego for one or two weekends, as they sometimes do, or if they want to stay out on the Coast longer, [647] they play San Diego. There is a week's booking available at the Orpheum Theatre here; there is the Golden Gate Theatre in San Francisco; and there is a one-night tour through the northwest which goes right up to Canada that a lot of orchestras take, and their usual route back East again.

Mr. Doherty: Your Honor, I did not want to interrupt the witness, but it seems to me he is only giving a recital of a story, something that he does not know himself. It

(Testimony of Larry Finley)

is a conclusion; it is argumentative; it is a picture rather than the fact.

Mr. Christensen: May I ask one question?

The Court: Yes, sir.

Q. By Mr. Christensen: Do you know that from your own knowledge and observations?

A. Yes, I do, Mr. Christensen.

Q. A few moments ago you told us about going into partners with the Dorseys. Was that with Tommy and Jimmy Dorsey?

A. Yes.

Q. I believe that was in the management and operation of the Casino Gardens at Ocean Park, is that right?

A. Yes.

Q. When did that commence, sir?

A. In the middle part of May. There were two deals, Mr. Christensen. One deal was, I purchased a one-third [648] interest in Collonades, Incorporated, which is the operating company for the Casino Gardens. Then I entered into a contract, a personal contract, with Collonades, Incorporated, to assume the management of Casino Gardens.

Q. The stockholders of the Collonades were Jimmy Dorsey, Tommy Dorsey, and yourself?

A. That is correct.

Q. And you did manage and operate that ballroom for how long, sir?

A. From the middle part of May until January 5th, 1946. [649]

Q. And was that a profitable operation, sir?

A. Yes, it was.

Q. What bands did you use there?

A. Tommy Dorsey, Jimmy Dorsey, Glen Gray,—

(Testimony of Larry Finley)

Q. Well, instead of that, can you tell me whether they were all from one agency or were they from different agencies?

A. No, they were from different agencies.

Q. What portion of the number you used were from M. C. A.?

A. The greater proportion.

Q. Did you talk with anybody from M. C. A. concerning the furnishing of bands to you there at Cosino Gardens?

A. Yes.

Q. With whom, sir?

A. Well, Mr. Howard was the man that I did most of my talking with. I did discuss it with Mr. Barnet, and talked about it with Mr. Bishop.

Q. Which of those conversations was first?

A. The first conversation was with Mr. Barnet.

Q. When and where was that?

A. Well, when I got back from New York, after making the deals with the Dorseys, I went in to Mr. Barnet and asked what was available in the line of bands for Casino Gardens. That was at the M. C. A. offices. He gave me a list of bands, and I don't recall if—I don't recall just who was on the list. He gave me a list of bands and I had a nice discussion with [650] him about it.

Q. How many bands were on the list, do you remember?

A. I don't recall, but I think there were six or seven, Mr. Christensen.

Q. And you chose some of them, did you, sir?

A. No, it was just a general discussion at that time. I went in to tell Mr. Barnet I wanted him to be the first in the office to know I had gone into the deal, and from then on Mr. Howard was the man—in fact, I asked him,

(Testimony of Larry Finley)

if I remember right, if Mr. Howard could take care of me down there.

Q. Have you now fairly and fully given us all the conversation that occurred on that occasion with Mr. Barnett?

A. Substantially, yes, Mr. Christensen.

Q. Then the next conversation concerning the booking at Casino Gardens was when, sir?

A. Well, one night Mr. Howard, and I think Mr. Bishop, I am not sure, came down with the Tommy Dorsey contract for signature, which was just a formality. That was Mr. Dorsey's engagement at Casino, which, of course, was through M. C. A.

Q. There was no particular conversation on that occasion, sir, concerning bands at Casino?

A. No. We kidded about it. I kidded about Tommy paying M. C. A. a commission for playing in his own place. That was just about all that happened.

Q. Then, if I understood you correctly, there was a [651] subsequent conversation concerning that same matter?

A. No, there was a discussion with Mr. Bishop at Ocean Park. That wasn't concerning—wasn't directly concerning bands at Casino.

Q. When was that, sir?

A. Oh, I should say probably in the middle of June.

Q. Was any one else present besides yourself and Mr. Ames Bishop?

A. Well, we had a little heart to heart talk as we were walking down the boardwalk there. There was only the two of us.

Q. Was it concerning bands in general, or in particular?
A. Yes, it was.

(Testimony of Larry Finley)

Q. Then will you tell us the conversation?

A. I told Mr. Bishop that I didn't want there to be any hard feelings, or anything in M. C. A.'s mind as far as connecting Casino Gardens and Mission Beach; that they were two separate operations, and the fact that they had their deal with Dailard in San Diego had no effect on my securing bands for Casino Gardens; that I wanted and needed bands for the Casino. And at that time Bishop told me, repeated the story that as far as the San Diego deal was concerned, why, he did it to protect his friend, Dailard. And we shook hands and became friendly after that. [652]

Q. Now, the Aragon Ballroom is located just one block from the Casino Gardens; is that right? A. Yes.

Q. Does the Aragon Ballroom also run name bands?

A. Yes, they do.

Q. M. C. A. name bands?

A. M. C. A. name bands.

Q. What, if any, effect have you observed on the Casino Gardens attendance when, for example, the Oragon Ballroom is running a top name band?

A. Well, I had one real chance to observe that. That was the week-end—it was Tommy Dorsey's last week-end at Casino Gardens. We were afraid business was going to fall off because it was his last week-end and M. C. A. had booked Cugat into the Aragon just one block away, and it meant two of their top, big name bands bucking each just one block away.

I clocked the Aragon, and I know they did a capacity business with Cugat for three days. Also, we also did a capacity business with Tommy Dorsey. So it didn't affect us in any way, Mr. Christensen, so far as the box

(Testimony of Larry Finley)

office was concerned. In fact, I think it helped us, if anything.

Q. Have you talked with any one from M. C. A. concerning getting or for the purpose of getting name bands for Mission Beach since Mr. Stutz has taken over Pacific Square? [653] A. Yes, I have.

Q. And with whom, sir?

A. Ames Bishop called me up.

Q. When was that, sir? I hate to interrupt you, Mr. Finley, but we should lay that foundation.

A. I believe it was in September or October, and he told me that he had a band available for me at Mission Beach. I don't recall the name of the band now. I know at the time I had never heard of it, and he told me what a great band it was. I am trying to think of the name, and I can't think of it. It was an all-girl orchestra.

Q. Could the name have been Caylor?

A. Yes, it is, Joy Caylor and her all-girl orchestra. I told Mr. Bishop I hadn't ever heard of the band and he ought to be ashamed of himself for asking me about it. So he went on to tell me what a great band it was. And I stated to him, I said, "Ames, let's quit the kidding." I said, "When are you going to give me some of your top bands, like Harry James and Krupa?"

And he says, "You are not going to get them."

I asked him if—I said, "Do you still have the same deal with Stutz as you have had with Wayne Dailard?"

And he said, "Stutz still continues to get first choice of bands in the San Diego area."

I said, "Is that the way you still feel about it?" [654]

And he said, "Yes."

(Testimony of Larry Finley)

That is the conversation—that is the only conversation I have had with him about Mission Beach.

Q. Well, is it necessary for you to have name bands at the Mission Beach Ballroom in order to successfully operate it?

A. Yes, just so long as our competition is what it is. There are two Class-A ballrooms. One is ours and one is Pacific Square. If we ran name bands and Pacific Square ran semi-name bands, they wouldn't do business, and we would. People are educated today as to names in music, and we must—if we were the only place to go to, Mr. Christensen, we could probably give them anything, but we are not. We have that competition to consider, and the ballroom definitely needs name bands to operate at a profit and successfully.

Mr. Doherty: May I ask you to fix more definitely the time and place and parties present of that conversation that he has related between Mr. Bishop and himself, and which he said took place some time in September or October? In other words, was it a telephone conversation, or a personal call, and will you develop where one was and where the other was, please?

Mr. Christensen: You are perfectly right, Mr. Doherty.

Q. By Mr. Christensen: Please do that, Mr. Finley.

A. It was a telephone conversation. I didn't call [655] Mr. Bishop. He called me.

Q. Where were you at the time?

A. I was in the office at Casino Gardens at the time. I believe he was in his office, and he probably could give you the date of it. I don't recall.

(Testimony of Larry Finley)

Q. Well, can you fix the date more definitely or more certain?

A. I am sorry, Mr. Christensen, I can't.

Q. Yesterday I had asked you something concerning the weather at San Diego, but I had only asked you concerning some of the fog. What is the weather generally there?

Mr. Doherty: Where is this?

Mr. Christensen: At San Diego, at Mission Beach.

The Witness: A. The weather at Mission Beach. It is really beautiful most of the time. We have warm evenings in town that drive people out to the beach in droves. I would say we have nine months, from my observation down there, of top weather. By "top weather" I mean nice warm sunshiny days and nice cool evenings at the Beach; ideal weather. I might state ideal beach weather for at least nine months of the year.

Q. By Mr. Christensen: Can you tell us something of the attendance there at the Mission Beach Amusement Center?

A. We have had as many as thirty-five and forty thousand people there on a Sunday afternoon. [656]

Q. Tell me what part of the year that would be.

A. Strangely enough, it is all through the year. We don't have it every Sunday, but there hasn't been too much change. Of course, on the 4th of July, and days like that, we have record-breaking crowds there. We had over 50,000 people there the 4th of July. But it is very strange, the attendance during March, April and October, November and December on Sunday afternoons will run capacity.

Q. What about the evenings, sir?

A. At the Beach?

(Testimony of Larry Finley)

Q. Yes, sir.

A. Very good crowds. That is at the Amusement Center.

Q. Well, the word "good" might mean something different to every one of us.

A. Very large crowds, I should say.

Q. That is the same thing. Can you estimate the number?

A. Five to ten thousand people on Sunday evenings, some Sunday nights. It would vary anywhere from 50 people to 5,000 people.

Q. The 50, on what kind of a night would that be?

A. Well, Sunday night, this past Sunday night, they had the rainstorm in San Diego in the evening that they had here Sunday noon, and I don't think there were 50 people there that particular night, and everything was closed. The park was really closed down. We had 60 people in the ballroom Sunday [657] night.

Q. Now, what has been your attendance in the ballroom there, using the same period of time?

A. Well, that varies also, Mr. Christensen, with—

Q. Explain it, please.

A. Well, with Tommy Dorsey there we had 2500 people, or 3,000 people, I think. Yes, I am quite sure that is right.

Q. You mean every night?

A. No, I am talking about Sunday nights. I am taking Sunday as the day. With most of our bands we can figure an average of four or five hundred people on a Sunday night. There is really nothing in the ballroom in the evening for them to stay over, to come to the ballroom.

(Testimony of Larry Finley)

Q. Could you give us an average for the Sunday night attendance at the ballroom, using different months or different seasons, as you need to, to explain it?

A. It would be pretty hard for me to say because I don't know definitely. I could hazard a guess on it, Mr. Christensen, if you like.

Q. If it is only a guess, I don't want it, but if it is from observation, I do.

Mr. Doherty: I think this witness has records that could give us very accurate information rather than a guess or estimate.

The Court: I would think so. [658]

Mr. Christensen: I am speaking of attendance rather than dollar volume right now.

The Court: I presume, without knowing it, that there is an attendance record kept at the gate?

The Witness: Yes. We have a federal law, your Honor, and I can get those figures for you, Mr. Christensen.

Mr. Christensen: Well, I want you to please do so before the end of this trial.

The Witness: Yes.

Q. By Mr. Christensen: Now, on occasions, at least, the Mission Beach Ballroom is let for private parties, isn't it?

A. Yes, we rent it out and give it out, both.

Q. Well, you rent it out on what sort of occasions?

A. We rent it out for private parties, where, for example, some of these boats come into the harbor. There is the flat-top, the Shangri-La, came out and we rented it

(Testimony of Larry Finley)

out to them. In fact, we just rented it to them last week. There was an occasion last week when it was rented to them, on Thursday night.

Q. And on occasions, you say, you give it out. Give us an illustration of some of those occasions.

A. We have donated the ballroom free of charge to the policemen, the firemen, and two or three other organizations for charitable work. We gave out the ballroom to the [659] Indoor Sports, Inc., which is an organization comprised of physically handicapped people. In that particular case we not only gave them the ballroom, but we gave them the band, we printed the tickets, we did their advertising, and we raised \$14,000.00 for them to build a new clubhouse.

Q. On these private parties, have you noticed what bands were used there?

A. Yes, every one's bands, including M. C. A.

Q. You mean M. C. A. has furnished bands to the Mission Beach Ballroom when a private party is being held there?

A. That's right. Not through us, however, Mr. Christensen. They make the deal with whoever is running the party.

Q. All right. Can you give me some illustration of that?

A. Well, the last one I am familiar with is Jan Savitt, who is a name band, and I think it was last Thursday night he was there for some kind of a Marine party.

Q. Some other occasions, sir?

A. I couldn't tell you. Mr. Austin has the record of that.

(Testimony of Larry Finley)

Q. Now, I recall Mr. Dailard saying the sea waters come up to and in the ballroom. What has been your experience there?

A. Never in the year and two months that we have [660] operated there have we had any water in the ballroom that has washed up from the sea.

Q. How far are you actually from the water? I am not talking about the sand beach, but from actually the mean high tide line.

A. The mean high tide line—well, once or twice a year the tide comes up to the boardwalk level, but we have never had any damage in the ballroom from the tide coming in from the ocean.

Q. What is your schedule of prices at Mission Beach, Mr. Finley?

A. Anywhere from 49 cents to \$1.75.

Q. Well, tell me how does the difference happen?

A. We opened originally with a price of \$1.25 per person. Then when we got Jimmy Dorsey in we figured the price would have to be a little bit higher on Saturdays and Sundays and week-ends and holidays to carry the tremendous price that we had to pay for him. So we checked, and we found that the Square, Pacific Square, was charging, I think it was \$1.85 on Saturday nights. So we raised our prices on Saturdays, Sundays and holidays to \$1.75, and let it continue at \$1.25 through the week. Then when Tommy Dorsey came in, I went out on the floor one night and I talked to some of the kids out there, and I asked them if they thought \$1.75 was too high for Tommy Dorsey. [661]

(Testimony of Larry Finley)

Q. I think you had better not give us any more of that conversation.

A. I am sorry. Our price for the Tommy Dorsey engagement was also \$1.75. After the Dorseys were out, we dropped back to \$1.25 with Glen Gray, and when we put a local band in, we didn't have much to offer in the way of music, so we dropped the price down to 49 cents plus tax, which is a 60-cent admission. That is the schedule of prices we have had.

Q. Do you know the schedule of prices at Mission Beach? A. At Mission Beach?

Q. I beg your pardon. I mean at Pacific Square.

A. \$1.25, \$1.35 and \$1.85. That is what it was a year ago, Mr. Christensen. I don't know if it still is.

Q. Now, you give us three figures.

A. I can add another figure. On Wednesday nights they advertise a waltz night at 90 cents. Tuesday nights they have their western night, and I believe they charge \$1.25 for that. On Friday nights I know they charge \$1.25. It is \$1.25 or \$1.35 on Saturday nights, and for some engagements \$1.85, and on Sunday nights back to \$1.25 or \$1.35.

Q. You say Tuesday nights are western nights at Pacific Square?

A. It used to be. It isn't any more.

Q. During what period of time was it that?

A. Right after my opening for a period of six months [662] approximately.

Q. Was that Bob Wills? A. That's right.

Q. Did Pacific Square have any western bands prior to the time you opened at Mission Beach?

A. No, they didn't.

(Testimony of Larry Finley)

Q. Why didn't you use a western band at Mission Beach?

A. Well, the only real draw in the country was Bob Wills, and when I took over Mission Beach they put him in the Square for Tuesday nights, and they made Tuesday night a western night. There was no sense in running anybody up against Bob Wills. He played at Pacific Square until he just played out; I mean, he was just there so long.

Q. I have already asked if you operated Casino Gardens, during the time you operated it, at a profit, I believe, but will you answer the question? I am not sure I asked you.

Mr. Doherty: Yes, he said it was a profitable operation.

The Court: I didn't hear you, Major.

Mr. Doherty: The question was asked him, and he said it was a profitable operation.

Mr. Christensen: That refreshes my memory. I think that is true. I will withdraw that.

Q. By Mr. Christensen: Will you tell me if your operation of the Trianon Ballroom has been a profitable operation during the time you operated it? [663]

A. Yes, sir.

Mr. Doherty: That is objected to as incompetent, irrelevant and immaterial, and outside the issues of this case. There is no way for comparison and it leads to speculation and guesswork.

Mr. Christensen: I offer it for the purpose—

The Court: Overruled.

The Witness: I am sorry, your Honor?

The Court: You may answer.

(Testimony of Larry Finley)

The Witness: Yes, the Trianon operation has been a very profitable one.

Q. By Mr. Christensen: Now, at the Mission Beach Ballroom did you do anything about promotion and advertising? A. Yes, quite a bit.

Q. Will you tell us what you did, sir, in order to bring the people down there?

A. The first thing we did was to get in the good graces of the military personnel in San Diego, and we wanted to show them in the quickest way possible that the operation of the park and the ballroom had changed. So we arranged to present shows on Saturday afternoons and Sunday afternoons, using the bands and the shows that we had at Mission Beach and also at the Trianon Ballroom.

I also arranged with the Department of Welfare and Recreation to supply the ballroom to them on Monday nights [664] free of charge, no charge for the ballroom, with the understanding that they would supply a military band for dancing, and they were to police it properly, send out extra Shore Patrol, and to permit any one in uniform, either male or female, and any girls, any civilian girls, in to dance with the boys free of charge. Also, on that particular night, we called it Military Night, we readjusted our prices throughout the park for the servicemen. We dropped the price of hot dogs from 10 cents to 5 cents, and all soft drinks from 10 cents to 5 cents. We let them play the amusement games for 5 cents, and let them ride the various rides out there for a dime. And it worked out very good. We had as many as seven and eight thousand men out there on Monday nights.

(Testimony of Larry Finley)

Also we donated the ballroom to the U. S. O. on Sunday afternoons for U. S. O. dances, which brought a lot of the military personnel out there on Sunday.

Then we had various functions with the newspapers, various promotional days, and had several things happening. Our most successful thing that happened in the ballroom was the Indoor Sports proposition, where we raised directly over \$14,000.00 and started the ball rolling for a \$50,000.00 goal for them to attain for these crippled people, and that was probably the greatest exploitation which we had in so far as the civilian trade was concerned. We receive letters from all over the world from servicemen that said they appreciated [665] what we were doing there.

I think those three things cover the main exploitations regarding the ballroom.

Q. And about advertising, sir?

A. We utilized the radio, newspaper, billboards, posters, sound truck. We even had a little gag on the street with a donkey.

Q. You had what?

A. With a donkey. We call it street promotion.

Plus that, there is an organization called the Heaven on Earth Club in San Diego that exploits the fine weather in San Diego, and that has a weekly radio program. They gave us, I think it was, four 15-minute periods free of charge to exploit the Beach, and a lot of the service clubs that had time on the air gave us free time.

Then we had a radio wire in the ballroom, in both ballrooms, I should say, at Mission Beach and also at the Trianon. and we would use the Trianon radio at times to exploit Mission Beach.

(Testimony of Larry Finley)

Then there is a great medium of advertising in San Diego called trash can advertising. Street poster service, they call it, and we have a contract with the City of San Diego whereby they keep the streets clean, and they have these trash cans that measure approximately 24 by—I think it is 24 by 30 or 24 by 32, and they are four-sided cans. They [666] have over 500 of them in San Diego, and they post sheets on these cans. At one time we were using over 400 trash cans for the purpose of exploiting the Beach. These cans are place—they are placed all over town, but particularly near where the boys come off the ferry from Coronado, where they come off the boats. That is probably the most effective means for hitting service personnel. I believe I told you we used over 400. We also used street cars.

Q. You mean banners on the street cars?

A. Banners on the street cars. I can say we used every known way for promotion and advertising.

Q. Yesterday you told us about making some changes in the electric lighting or wiring at Mission Beach, and I am not quite sure what it was you did. Do you want to get a drink of water?

A. No. I am sorry. I caught a little cold last night.

We have over 100 overhead fixtures in the ballroom. They are quite large. They are approximately 24 inches, that they would measure across the bottom, and five or six feet in height. There are over 100 of them, and they are all controlled by the central board. When the City built this ballroom, I understand it spent over \$100,000.00 on the wiring alone, just for this large ballroom. It is larger than any board for any theatre in San Diego. [667]

(Testimony of Larry Finley)

I wanted to operate the ballroom on the basis that lighting adds romance to a ballroom, and adds atmosphere, and the greatest way to get atmosphere is with proper lighting.

So, on checking, we found only 32, I think it was, of these lights that were in working order, and we had to have them all rewired. Now, for any change in tempo there are 13 different color combinations, and for every change in tempo there is a different change in lighting. In other words, for a waltz we give them a light blue lighting, and we have what you call twinkling stars, we have arranged a twinkling system on the ceiling and have twinkling stars. For a jump number, when the kids are jive dancing, we give them bright lights or red lights.

Another thing we have done, I had Professor Schwenkowski, who is dean of art at U. S. C., paint 24 portraits of motion picture stars. We call that the "Gallery of Stars." We have them on the pillars there. They are large pictures, I think it is about 22 by 32 or 33, about the same size as the trash can poster, and we have individual lights over each of the pictures. That also is on a rheostat and they dim, they go on and off during the evening.

We have done a great deal of concentrating on lighting, and our stage lights have been fixed up, and we have, I believe it is, 12 spotlights from the stage alone.

Q. Now, during the time that you have been operating [668] Mission Beach what has been Mr. Dailard's advertising?

A. Mr. Dailard was using—in the first term they had, "Home of M. C. A. World Famous Bands."

(Testimony of Larry Finley)

Q. And has that continued right straight through?

A. Well, up to the time he sold it. His sig. cut, the part of it that had where the band is playing, say, if it is Pacific Square, why, the sig. cut always had on it, "Music Corporation of America Bands." But the first campaign that hit us was billboards and street cars, and six-sheets, and all said it was, "Pacific Square, Home of M. C. A. World Famous Bands."

Q. Does that continue right up to this date?

A. No, with Mr. Stutz taking the place over, it has been discontinued. In fact, the only mention of M. C. A. —well, I don't know if it is the only mention and, of course, the ads all carry, "M. C. A. present Bob Crosby," or "M. C. A. presents" whatever the band is. But there are still signs on the building that say "Music Corporation of America bands," painted as a part of the Pacific Square Building.

Q. Now, do you know whether or not you made or lost money in the operation of the Mission Beach Ballroom since you have taken it over?

A. I have lost money, Mr. Christensen.

Q. Can you tell me how much, sir?

Mr. Doherty: Let me say that his books of accounts and [669] records are the best evidence, unless he wishes to give merely an estimate.

The Witness: I could give an estimate at this time.

The Court: He is the owner of the project, and I think he may answer that. Overruled.

What are you examining there?

The Witness: A notation I made of figures, your Honor.

The Court: Proceed.

(Testimony of Larry Finley)

The Witness: I have to add two of them here.

Mr. Doherty: Let the record show that the witness is reading from a memorandum in his hand.

The Witness: \$122,000.00 loss on the ballroom up until December 31st.

Q. By Mr. Christensen: Since December 31st of 1945, have you made or lost money to this date?

A. We have lost money, but I can't tell you how much, as I haven't seen a statement yet.

Q. Can you estimate it?

A. No, I can't. I haven't any idea.

Q. You have had quarterly reports, or, I think it is quarterly reports, isn't it, sir?

A. Yes, we have.

Q. Made by a certified public accountant?

A. That's right.

Q. I find here the report as of February 28, 1945, as [670] of May 31, 1945, as of July 31, 1945. Was there another quarterly after that, sir?

A. What was the last one you read, Mr. Christensen?

Q. July 31, 1945.

A. When is the next one you have?

Q. Oh, probably it is this one. Yes, as of September 30th, 1945? A. That's right.

Q. Then as of December 31, 1945? Is that correct, sir? A. That is correct.

Mr. Christensen: Mr. Doherty, there are copies right here and Mr. Jaffe will make the copies available for your inspection.

Q. By Mr. Christensen: Is this document which I hand to you here, "Mission Beach Amusement Park, San Diego, California, financial statements as of February 28,

(Testimony of Larry Finley)

1945," and which appears to be on the stationery of Jack M. Ostrow, Certified Public Accountant, Los Angeles,—is that the report as of February 28, 1945, sir?

A. Yes, it is.

Mr. Christensen: We will offer this as our next exhibit in order.

Mr. Doherty: Objected to on the ground that no foundation has been laid, and it is hearsay.

The Court: May I see the document? [671]

Mr. Christensen: Right here, your Honor.

(The document referred to was handed to the court.)

Mr. Doherty: No basic foundation has been laid. This witness did not prepare this. It is hearsay as to him, and not binding upon these defendants.

The Court: I suppose there should be some regular proof of the C. P. A.'s status, unless it is agreed that he is a certified public accountant.

Mr. Doherty: It does not permit me, your Honor, to cross-examine any one.

The Court: No, but it permits you to submit these to other experts who can give you their version of it.

Mr. Doherty: Not, your Honor, without reexamining the books. We would have to have a certified public accountant go over them and examine all of their records.

The Court: The document appears to be of the entire project. I have noticed, however, in the exhibit a statement with respect to the ballroom itself. The books, of course, should be produced so that the other side can examine them. We want to expedite the proceeding as much as possible, and under the appropriate federal authorities it isn't necessary that we take up the time in the court room by a meticulous examination of financial

(Testimony of Larry Finley)

records, but it is essential that if audits are to be introduced that the supporting documents be made available to the other side. That has been clearly [672] held in the Ninth Circuit in three or four important mail fraud cases.

Mr. Christensen: They are available, your Honor.

The Court: I don't see them here. If they are here, then probably the better way would be to put the auditor on the stand and have him testify.

Mr. Christensen: We don't actually have him in court now.

The Witness: Pardon me. Mr. Ostrow was due here at 11:00 o'clock. He is due here in a minute, your Honor.

The Court: If he comes in, you can put him on the stand. But that is the rule, ladies and gentlemen, in order to save time. Otherwise we would have an interminable proceeding in having the books examined *seriatim* in the court room. Now, in order to save time, the decisions have obviated that necessity in cases of this kind, but the supporting documents must be here so that they can be examined by the other side, and the testimony must come through the mouth of the auditor who has made the examination, so that then it comes under the sanction of an oath.

I do not believe that the audits themselves, in the face of the objection, are admissible at this time.

Mr. Christensen: Would you be willing to stipulate that Mr. Ostrow is a certified public accountant, sir?

Mr. Doherty: He has signed his name as such. I know he [673] would not do that if it were not true.

The Court: It appears that he is available. I think he could be produced.

(Testimony of Larry Finley)

Mr. Christensen: He is supposed to be here at 11:00 o'clock, and I notice it is now 11:00 o'clock, your Honor. He will be here any minute.

The Court: The objection is sustained without prejudice.

Ladies and gentlemen, we will take our recess at this time. Remember the admonition and keep its terms inviolate. Occupy the jury room during the recess.

(A short recess was taken.) [674]

The Court: All present. Proceed.

Mr. Christensen: Mr. Ostrow has not as yet arrived, and may I suggest that we proceed to cross-examine on other matters and give us an opportunity to recall Mr. Finley, if necessary, in connection with the books, or we can have the books here as quickly as possible.

The Court: Is that the only phase of the examination of the witness that is uncompleted?

Mr. Christensen: That is correct, your Honor.

Mr. Doherty: I was going to suggest, your Honor, for our convenience, if counsel would give us duplicate copies of the various audits he intends to introduce?

The Court: Yes; that could be done.

Mr. Doherty: And that will probably give us a chance to examine them during the noon hour.

Mr. Christensen: Haven't you gotten them yet?

The Court: I understood Mr. Christensen to say he has them here.

Mr. Doherty: I understood from Mr. Warne—

Mr. Warne: You have not given me any of the additional ones.

Mr. Christensen: They are right there, Mr. Doherty. I am sorry I did not actually hand them to you.

(Testimony of Larry Finley)

The Court: Let us mark all the originals for identification, Mr. Christensen. [675]

Mr. Christensen: In addition to the ones you have, there you are, sir.

The Court: How many are there? Let us mark them all as one exhibit, serially.

The Clerk: All as one exhibit?

The Court: Yes, serially.

The Clerk: There are six in all. They will be Plaintiff's Exhibits No. 12-A, 12-B, 12-C, 12-D, etc.?

The Court: 12.

The Witness: Pardon me, your Honor. Mr. Ostrow has just come in.

The Court: The witness states that Mr. Ostrow has just entered the courtroom.

Mr. Warne: These are marked for identification only, your Honor, at this time?

The Court: That is all; so that you will be able to make the comparison. That was the purpose of marking them.

Mr. Warne: Yes.

(The documents referred to were marked as Plaintiff's Exhibits Nos. 12-A, 12-B, 12-C, 12-D, 12-E and 12-F, for identification.)

Mr. Christensen: May I recall Mr. Finley at this time, and ask Mr. Ostrow to come forward, if you would like to do it in the manner that I first suggested?

Mr. Doherty: Whichever way will be more convenient to [676] counsel in the order presentation of his case. He can have Mr. Finley step aside and introduce his auditor, or proceed to finish with Mr. Finley.

(Testimony of Larry Finley)

Mr. Christensen: Let us proceed and finish with Mr. Finley, and then I would like to get all the reports available for you.

Mr. Doherty: Are you through now with your direct examination?

Mr. Christensen: Yes, with the single exception I told you.

Mr. Doherty: Which was that?

Mr. Christensen: The books.

Mr. Doherty: About the books?

Mr. Christensen: Yes, sir.

Cross-Examination

By Mr. Doherty:

Q. Mr. Finley, you stated yesterday that you were 32 years of age?

A. Yes; that is correct.

Q. And where were you born?

A. Syracuse, New York.

Q. How long have you been a resident of Los Angeles County?

A. Since 1934, with the exception of the period starting in February of 1944, from February of 1944 until—I [677] think it was October of 1945.

Q. And where was your residence from February, 1944, until October of 1945?

A. In New York City and also in San Diego.

Q. What part of that time were you a resident of New York City?

A. From February until—from February of 1944 until July of '44.

(Testimony of Larry Finley)

Q. And when did you become a resident of San Diego County?

A. In July of '44.

Q. And how long did you continue to be a resident of San Diego from July, 1944?

A. Until we moved back to Los Angeles. I think it was October of '45, but I am not sure of the month. That might be one month one way or the other.

Q. You gave your deposition in this case on October 8, 1945? A. That is right.

Mr. Doherty: Have you a copy of the deposition, Mr. Christensen?

Mr. Christensen: Yes, I have, sir.

Q. By Mr. Doherty: And that was taken here at Los Angeles? A. Yes. [678]

Q. You were represented at that deposition by Mr. Desser, Mr. Rau and Mr. Christensen, your attorneys?

A. Yes.

Q. And the defendants were represented by Mr. Warne, I believe, Mr. Clore Warne? A. Yes.

Q. I will direct your attention—

Mr. Christensen: Actually, by Mr. Rau.

Q. By Mr. Doherty: Mr. Rau was present at the taking of the deposition. I will direct counsel's attention, if you will show the witness for convenience and to follow it, page 3 of that deposition, beginning on line 4, and ask if you did not at that time give this testimony:

“Q. By Mr. Warne: Where do you reside, Mr. Finley?

“A. 164 North Woodburn Drive, Los Angeles, and 4255 Ridgeway, San Diego.

(Testimony of Larry Finley)

"Q. Which of those two places do you maintain as your residence for tax purposes?

"A. 4256 Ridgeway, San Diego.

"Q. You have lived there how long?

"A. Seven months."

You so testified? A. Yes.

Q. And your residence, then, began in San Diego, seven months prior to October the 8th, 1945? [679]

A. That is a mistake on your part, Mr. Doherty. My residence in San Diego—this was not my first residence in San Diego. I bought this home seven months prior to the time I gave this deposition. I also had another address in San Diego previous to this one.

Q. You have lived at another address? A. Yes.

Q. Well, I will continue. Line 12, page 3:

"Q. Have you made any tax returns from that address and giving that as the official address?

"A. No, not as yet.

"Q. Have you ever voted in that county?

"A. No, not yet."

Is that correct? A. Yes.

Q. Back in Utica, New York, you were employed by a firm in the jewelry business known as Marksons, I believe? A. That is correct.

Q. When did you go to work for them?

A. When I was eight years old.

Q. When you were eight years of age?

A. That is correct.

Q. In what capacity?

A. Clean-up boy, porter, errand boy, before schools and after schools. [680]

(Testimony of Larry Finley)

Q. That would be in 1922? A. 1921, I believe.

Q. 1921? A. Yes.

Q. You were born in 1913? A. That is correct.

Q. And what month?

A. May; the 4th day of May.

Q. You will be, then, 33 next May?

A. That is correct.

Q. How long did you continue to work for Marksons?

A. All through the time I was going to school, grammar school and high school, and after I got out of high school. I believe the year was—well, that taxes my memory. If I recall right, I left Marksons in 19—I think it was '31, and then just before I resumed, just before I took over the management of the Cafe DeWitt in 1934 I worked for them for five or six months previous to that time.

Q. After you left high school in what capacity did you work for Marksons?

A. I managed their jewelry department.

Q. Did they have other departments in that store?

A. Yes. It was a very large furniture store with a small jewelry department in it.

Q. And you were at that time about 18 years of age? [681]

A. If you figure it back, that might be it; yes, sir.

Q. Was it credit jewelry? A. Yes.

Q. And sold trinkets and watches and clocks and things of that sort, like you do in a small credit jewelry store? A. Yes.

Q. And you say you were in charge; you were both the head and the tail of it, were you not? A. No.

(Testimony of Larry Finley)

Q. How many employees did you have under you when you first took charge in the jewelry department?

A. Two.

Q. Sales girls?

A. One sales girl, one watchmaker.

Q. One watchmaker? A. Right.

Q. And you continued with that until you were then how old—until you went to the Cafe DeWitt?

A. Around 20 years of age. I think I left them at '31 and went back to work for them prior to the Christmas season. I know I went back to work for them prior to the Christmas season. I know I went back to work for them prior to the Christmas season of 1943.

Q. And during the time that you were working for them as a salesman did you work six days a week? [682]

A. Are you talking about while I was going to school, Mr. Doherty?

Q. No; after you left school. I understand when you went to school it was only intermittent? A. Yes.

Q. And sometimes during vacations and sometimes on a Saturday afternoon or a Saturday morning?

A. That is not correct.

Q. When you were going to school did you work six days a week?

A. Six and seven days a week.

Q. And went to school, too? A. Yes.

Q. That is high school? A. That is right.

Q. You went over there after school hours?

A. I went there before school, I went there after school, and I worked many Sundays.

(Testimony of Larry Finley)

Q. Did you run the jewelry department as the manager while you were going to school? A. No.

Q. I am speaking, Mr. Finley, of the time you became manager of the jewelry department. Did you work six days a week or—

A. Six or seven; yes. [683]

Q. You kept open on Sundays? A. No.

Q. Work evenings, too? A. At times.

Q. And was that true during all the years that you worked with them until you left them in 1931?

A. No; it wasn't.

Q. What hours did you work other than what you have stated?

A. Well, I worked less hours. For a while I had this band idea in mind and I would take a leave of absence while I worked with the band.

Q. That would be in the summer months?

A. Yes; in the summer months.

Q. But during the other months you worked there six and seven days a week?

A. Yes, at times, for spells.

Q. And you did not do any band business, entertainment business during that period, did you, excepting an occasional night engagement?

A. That is correct.

Q. And when you took these summer vacations how long would they be—two or three weeks or longer?

A. I remember one vacation was a six-weeks vacation.

Q. Did that happen more than one year? [684]

A. I honestly don't remember. I don't think it did.

(Testimony of Larry Finley)

Q. And that is your activities in the entertainment business so long as you were with Marksons?

A. That is correct.

Q. And you left them when you were 20 years of age?

A. Well, no. You see, I left them before 1931. I left them for a spell while I went to work for Station WSYR in Syracuse.

Q. What power was that station?

A. At the time? It was either 500 or 1,000 watts.

Q. What was your job with that station?

A. I was the salesman on the commercial staff; I did some announcing and I produced a few shows.

Q. And by a salesman, you mean you went around to various firms that wanted to advertise and had them agree to advertise over the station?

A. That is correct.

Q. And sometimes you announced the accounts that you solicited?

A. Yes.

Q. And you did that on a salary or commission basis?

A. Both salary and commission.

Q. And then you promoted some small shows?

A. Yes.

Q. Then, after you left—how long were you with that [685] radio station?

A. About a half a year, if I remember right. It goes back quite a ways.

Q. Then where did you go?

A. After I left the radio station?

Q. Yes.

A. As I remember, I went back to Marksons for a while.

Q. In charge of the jewelery department?

A. That is right.

(Testimony of Larry Finley)

Q. How long did you stay at Marksons?

A. I can't give you dates, Mr. Doherty. It is pretty far back. But I remember the—

A. Approximately the number of months; were you there six months or less than six months or more than six months on that occasion?

A. Well, I think it was over a year, if I am not mistaken.

Q. Over a year on that occasion? A. Yes.

Q. And then that brought you up until you were about 20 years of age? A. 20? No.

Q. How old were you then?

A. Younger than that, I think.

Q. Older than that? [686]

A. Younger than that. Yes; that would take me to 17 or 18, wouldn't it?

Q. You were born in 1913, and you say you left Marksons in 1931 and you went to the radio station for about six months.

A. I didn't say I left Marksons—that is a mistake—in 1931. I left Marksons to take this job in the radio station in 1928. I believe I testified to that.

Q. 1928? A. That is right.

Q. At that time, then, you were 15 years of age?

A. That is right.

Q. And you were acting as a salesman for that radio station and doing occasional announcing?

A. That is right.

Q. And when did you go back to Marksons? Immediately after leaving the radio station?

A. Every time I would leave, they would come back, they would try to get me back, and I don't remember just

(Testimony of Larry Finley)

how long I was with the radio station. But I know they asked me to come back and I went back. That was six or eight months after I had left radio work.

Q. When did you finally leave Marksons, what year?

A. I finally left them January 1, 1934. That is the last time that I left them. [687]

Q. And that time you were then almost 21 years of age?

A. That is right.

Q. That is, lacking four months.

A. Five months.

Q. And before going back to Marksons the last time, you had this Cafe DeWitt, or did you go to the Cafe DeWitt after you left Marksons?

A. I went to the Cafe DeWitt after I left Marksons.

Q. That was in January, 1934?

A. January the 2nd, 1934.

Q. Now, you gave up your band business about 1931?

A. Approximately at that time, yes.

Q. That is when you were 18 years of age?

A. Right.

Q. And you had no further activities in playing in the band when you went back to Marksons that second time?

A. That is right.

Q. And then you went to the Cafe DeWitt?

A. Right.

Q. And you were not yet 21 years of age?

A. That is right.

Q. And you say you became the manager of that night club?

A. That is correct.

Q. That was located in Syracuse, New York? [688]

A. That is correct.

(Testimony of Larry Finley)

Q. And you stayed there six months? A. Yes.

Q. Then you came to Los Angeles?

A. Correct.

Q. And you were just past 21 then? Correct.

Q. And you endeavored, first, to get a job in the entertainment or radio field here? A. Correct.

Q. And you attempted to do that over a period of some three or four months? A. Yes.

Q. And you were not successful in getting the kind of employment or any employment in that particular field during that period?

A. At the kind of a salary I wanted.

Q. Yes. A. That is correct.

Q. So you went to work at a jewelry store here in Los Angeles? A. Right.

Q. What was the name of that jewelry store?

A. Tipps.

Q. T-i-p-p-s? [689] A. Right.

Q. Was that a credit jewelry store? A. Yes.

Q. And you lasted or you stayed there two weeks?

A. Right.

Q. And then you went to work for the Hudson Diamond Company? A. That is correct.

Q. And you stayed there over five years?

A. Approximately—well, let's see; approximately eight years.

Q. Approximately eight years? A. Yes.

Q. I don't want to be unfair to you. You came to Los Angeles in July, 1934? A. Yes.

Q. You spent four months looking for a job, which would bring you up until about November, 1934?

A. Yes.

(Testimony of Larry Finley)

Q. And then you went to work for David Tipps for two weeks? A. For two weeks.

Q. For two weeks, which will bring you, say, to December 1st, 1934? A. Yes. [690]

Q. Then you went to the Hudson Diamond Company, which would be approximately January the 1st, 1935. It would be December, but I am giving you the beginning of the year for easy computation. Now, that would bring you, if you worked there eight years, clear up into 1943?

A. I worked until the time I went into business for myself, which was 1939. So, how long would that be?

Q. Well, from 1935 to 1939 would be four, four and a half, five years, depending upon what part of the year you take it. A. That is right.

Q. So you want to correct your statement about eight years? A. Yes.

Q. Well, Hudson Diamond Company was also a credit house? A. A cash and credit.

Q. Yes. And were you working on a salary and a commission? A. Yes.

Q. In each instance. Then after you left the Hudson Diamond Company you went to work in Santa Monica, didn't you? A. Yes.

Q. You worked there on and off for a year?

A. I went back and forth from Santa Monica, from Reader's in Santa Monica to Hudson's downtown twice. I just [691] shuffled back and forth on two different occasions.

Q. But you were connected with the Santa Monica store for nearly a year, were you not? A. No.

Q. Or on and off for a year?

A. On and off for a year; yes.

(Testimony of Larry Finley)

Q. Was that during a part of the same time you were working for the Hudson Diamond Company?

A. I left the Santa Monica store to go in business for myself.

Q. What year was that, 1940? A. 1939.

Q. What part of the year? A. August.

Q. Now, during the time you were with David Tipps, when you came here in 1934, up to the time you went into business for yourself, what activity did you have by way of a living or calling in the entertainment or musical field during this period of approximately five to six years?

The Witness: Pardon me. Would you read that question again?

(Question read by the reporter.)

A. Oh, for three or four months I had a two-hour record show on KMPC in Beverly Hills. That was six mornings a week, sponsored by Hudson's. I would go down and prepare the program, [692] present it and announce it.

Q. In other words, Hudson Diamond Company would buy two hours on Station KMPC?

A. That is correct.

The Court: Wait a moment. Is that the right station?

The Witness: Yes, it is, your Honor.

The Court: KMPC?

The Witness: That is right, your Honor.

Q. By Mr. Doherty: What hours were those programs?

A. 6:30 until—it was either 6:30 to 8:00 or 6:30 to 8:30.

Q. In the forenoon? A. In the morning.

(Testimony of Larry Finley)

Q. In other words, the Hudson Diamond Company were putting on advertisements and you were playing the records and making the announcements?

A. That is correct.

Q. What year was that? A. 1938.

Q. That is when KMPC was a part-time, thousand-watt station?

A. I don't know the mechanics of KMPC.

Q. That is before it became owned by Mr. Richards, the present owner?

A. I can't answer that, either, Mr. Doherty. [693]

Q. All you know is that you got there a little after six in the morning and you stayed until a little after eight, and you played records and made announcements?

A. That is correct.

Q. Is that correct? A. Correct.

Q. And tried to sell Hudson Diamond's products?

A. Correct.

Q. That was the only activity you had in the entertainment or musical field during those approximately five or six years until you went into business for yourself?

A. Correct.

Q. Is that right? A. I believe you are right.

Q. Yes. Then you decided to open a store in Burbank? A. That is right.

Q. And that was a credit jewelery store? A. Yes.

Q. About what size was that store when you first opened it, the room?

A. The room when I first opened was a 16-foot front by 105 feet in depth. That was when I first opened it.

(Testimony of Larry Finley)

Q. Yes. Then you later on opened a branch over on Lankershim Boulevard in North Hollywood?

A. That is correct. [694]

Q. And what size was that store?

A. 14 by 35 or 40. I don't recall.

Q. And both were known as credit jewelery stores?

A. That is correct.

Q. And then you later opened another one across from the Lockheed plant?

A. No. I had another store before that.

Q. You had the Lockheed one before you had the—

A. No. We enlarged our Burbank store and took on an extra 16 feet for appliances and opticals in our offices.

Q. I am speaking now about your so-called branch store. Your first store was Burbank? A. Yes.

Q. Your second one was in North Hollywood on Lankershim? A. Yes.

Q. And the third was 'across from the Lockheed plant?

A. Yes. But before we opened the Lockheed, we enlarged our Burbank store.

Q. What size was the Lockheed 'store?

A. The Lockheed store was—I don't recall the size. Mr. Doherty. Oh, about 14 feet square, I should say, 14 or 15 or 12.

Q. Yes. That is the one where you sold working clothes and alarm clocks? A. No. [695]

Q. Did you sell the working clothes at the Lockheed? A. No; we didn't.

Q. Where did you sell them, out of the Burbank?

A. Burbank and North Hollywood.

(Testimony of Larry Finley)

Q. And you sold those businesses out in January of 1944? A. That is correct.

Q. Did you have a partner in those businesses?

A. Yes, I did.

Q. Who was your partner? A. Robert Thorne.

Q. And he was the part owner of them?

A. Yes.

Q. Was Mrs. Finley a partner with you also?

A. Yes. It was a four-way partnership. I actually owned 25 per cent of the business, Mrs. Finley owned 25 per cent, Mrs. Thorne owned 25 per cent, and Mr. Thorne owned 25 per cent.

Q. And that was drawn up in a regular form of articles, a copartnership? A. Yes.

Q. And that is how those stores were operated during those approximately three years?

A. I believe you are right.

Q. Yes. Now, in connection with your merchandising of [696] those credit jewelry stores you hit on the plan of putting on free shows at the Casino ballroom?

A. Yes.

Q. You would pick out a night where the local management knew there would be a slim crowd and you bought it that night, is that correct? A. Yes.

Q. Usually a Tuesday night?

A. I don't recall if it was a Tuesday or a Thursday.

Q. Anyhow, they were what is known in the band business or entertainment business as "thin" nights?

A. That is correct.

Q. And you would then send out a great number of free tickets to as many people whose names you could get, connected with the Lockheed or other defense work-

(Testimony of Larry Finley)

ers, and have these tickets collected at the door as free admissions? A. That is not right.

Q. Did you sell the tickets? A. No; we didn't.

Q. You gave them away, did you not?

A. Yes. We didn't send them out. They came in the stores to get them.

Q. You advertised that they could get them at the stores? A. That is correct. [697]

Q. And the show was put on under the auspices of Finley's the Jeweler? A. Yes, Finley's.

Q. And you would use them as a means of selling your merchandise? A. No.

Q. It was not a promotional plan to sell merchandise?

A. It was merely to acquaint people with the store and the location of the store. They did not have to buy anything to get a ticket. They were under no obligation.

Q. I did not say—

A. That was not what you said. I am sorry.

Q. No. I did not say, Mr. Finley, that they had to buy to get the ticket; but the purpose of issuing the ticket and putting on the show was to promote Finley's, to sell merchandise? A. It was sales promotion; yes.

Q. And you think that that happened some five or six times during the approximately three years you were in business?

A. I don't know the exact number of times. We did it several times.

Q. Well, how many times; less than five times or more than five?

A. It might have been less than five. I don't recall [698] the exact number of times.

(Testimony of Larry Finley)

Q. And what other activities during this approximately three years you were in business did you have in connection with the entertainment or music business?

A. Well, at one time, I recall just before Pearl Harbor a group of business men in the Valley and myself had plans drawn up for a half million dollar ballroom that we were going to build in the San Fernando Valley. That was the time that I called M.C.A. and requested that they send someone over to me to talk about bands. Mr. Ames Bishop came over at that time and we discussed the band situation. As I recall, he saw the plans and specifications that we had drawn up.

Q. Now, Mr. Finley, if you will just listen to my question? I say, what other activities did you have in the entertainment or musical field? I am not interested in plans about what you were going to build. What shows did you put on; what did you do in the way of presentation of musical entertainment?

A. I am sorry. I thought you meant what activity, Mr. Doherty. That took quite a bit of my time at the time. That is why I mentioned it.

Other activities, I worked with Warner Brothers on their premiere of Dodge City. They had premiere of the picture Dodge City in Dodge City. A train left from Burbank. The Chamber of Commerce worked with Warner Brothers, and I was in [699] charge of the entire parade and broadcast and the ceremonies at the station that took place in Burbank. I conducted several large dances in connection with bond drives, erected the first bond booth in my store, had radio broadcasts from the store, produced and staged the midnight show for the Merchants Association. It was very well received.

(Testimony of Larry Finley)

Q. Now, the broadcast you spoke of was from your store to advertise Finley's?

A. No; it wasn't. In fact, there was no mention made whatsoever of Finley's on that broadcast. It was a bond drive and I did not want any publicity on the thing. [700]

Q. That was non-commercial? A. That's right.

Q. The street dance was non-commercial?

A. That's right.

Q. And this other entertainment you referred to here was entirely non-commercial?

A. From a personal standpoint, do you mean, Mr. Doherty?

Q. Not from your standpoint, but the whole activity. No one was going to make money out of it?

A. No. Admissions to the street dance were by the purchase of stamps or bonds. Admission to the show was by the purchase of bonds. We raised \$600,000.00, I think, in bond purchases on it.

The only truly commercial ballroom enterprise I had when I was in business was that I promoted the first swing-shift dance that was ever held for aircraft workers in this area. In fact, I originated the swing-shift dance.

Q. Now, you have told us of the activities you have had in the entertainment and similities activities since you were a young man back with Markson's?

A. I don't recall anything else.

Q. Pardon?

A. I might have. I don't recall anything else off-hand.

Q. Now, when you made this bid to the City of San Diego [701] in October, 1944, you addressed it to the Mayor and the City Council and the City Manager, I believe? A. Yes.

(Testimony of Larry Finley)

Q. That was in response to specifications?

A. That is correct.

Q. And you wanted the Mayor and the City Council to have a true picture of your background?

A. That is correct.

Q. So they would be able to pass upon whether you were the type of person to operate Mission Beach?

A. That is correct.

Q. Do you remember making in that bid the following statement, on page 4, paragraph 17, and I am quoting,—

A. Yes.

Q. —“My experience in the amusement and entertainment world has been varied and extensive, for the past twenty years having been successfully connected with radio, theatre and ballroom enterprises.” You made that statement? A. Yes, I did.

Q. Did you tell the members of the City Council at that time that twenty years from October, 1944, would bring them back to the period when you were eleven years of age?

A. Did I tell them that? Q. Yes

A. No, I didn't, but I did not tell an untruth when I [702] made that statement.

Q. In other words, you say this is a true statement?

A. Yes.

Q. That “My experience in the amusement and entertainment world has been varied and extensive, for the past twenty years having been successfully connected with radio, theatre and ballroom enterprises”? A. Correct.

Q. That is a true statement? A. Yes.

Q. But you did not tell the members of the City Council and the Mayor that twenty years prior to that bid

(Testimony of Larry Finley)

would bring you back to a period when you were eleven years of age? A. That is correct.

Q. Now, you went to New York after you sold out in February, 1944, and you remained there for six months?

A. Yes.

Q. Then you returned to Los Angeles?

A. To San Diego.

Q. To San Diego. I believe you had been connected or known a Mr. McKinnon while you were around Burbank, did you not? A. That's right.

Q. He used to operate a weekly newspaper in that area? A. No. [703]

Q. Wasn't he in the newspaper business in North Hollywood or Los Angeles? A. Yes.

Q. When I said in that area, by Burbank and North Hollywood I mean that area.

A. Yes, it was a semi-weekly paper.

Q. A semi-weekly paper?

A. That's right, plus other papers that he published.

Q. Then later he went to San Diego and opened a weekly paper?

A. I am not familiar with that. I don't think that is the way they sell—

Q. Anyway, you became acquainted with him?

A. Yes.

Q. And Mr. McKinnon and you were jointly interested in making an application for a radio station,—an application made sometime in 1944? A. Right.

Q. He is still in San Diego? A. Yes, he is.

Q. And publishing a paper?

A. A daily paper in San Diego.

Q. How? A. It is a daily paper, not a weekly.

(Testimony of Larry Finley)

Q. Yes, a daily paper. You bought the Trianon in [704] August, 1944? A. Yes.

Q. And you operated that without name bands?

A. That is correct.

Q. As you said this morning, you have had a successful operation there? A. Most successful.

Q. How far distant is that from Pacific Square?

A. Around a couple of miles, I should say.

Q. A couple of miles? A. I should say so, yes.

The Court: Where is it located?

The Witness: At 11th and Broadway.

The Court: And Pacific Square is at the foot of Broadway?

The Witness: It is at the foot and up several blocks. It is about 22 or 25 blocks, I should say, in distance.

Q. By Mr. Doherty: Is it on the same street, approximately?

A. No, it isn't. The Trianon is on Broadway, which is the main street of San Diego, and the Pacific Square is on Pacific Highway.

Q. When did you first become interested in actually bidding on Mission Beach? I believe yesterday, to refresh your memory, you said when Reichman was playing at Pacific Square and Freddie Martin was playing at Mission Beach. [705]

A. I don't think I said that yesterday, Mr. Doherty.

Q. Well, you said on your way one time from your home you picked up two servicemen and went up and looked at it. A. That is correct.

Q. I don't remember that you gave any date, but you did state that later you went over there and talked to Freddie Martin, when he was playing there? A. Yes.

(Testimony of Larry Finley)

Q. And that was the time that Reichman was playing at Pacific Square?

A. Well, I made up my mind I would be interested in bidding on it the night I was at the Beach with the two sailors.

Q. When did you begin any active preparations to bid for Mission Beach?

A. Not for a while after that. I was very much occupied with the Trianon, and with the hopes of getting our application for the radio station, and I remember at that time my wife was taken to the hospital and had a very serious operation, so I was detained in my plans for a short spell of time. I didn't have too much time to think of it.

Q. I am showing you Plaintiff's Exhibit 9, and I am showing it to your counsel, and on September 15, 1944, it shows Joe Reichman playing at Pacific Square and Freddie Martin at Mission Beach. Was that the occasion when you [706] spoke to Freddie Martin?

A. Yes, I spoke to Freddie when he was there for three nights.

Q. Had you made up your mind to bid for Mission Beach before you talked to Freddie Martin on September 15th, or after that?

A. No, it was before that occasion. I remember telling Freddie I was going to bid on the Beach, and I had hopes of getting it.

Q. Prior to that time you had determined to bid?

A. Yes.

(Testimony of Larry Finley)

Q. Had you taken any steps towards interviewing the Council before that time?

A. I don't know if I talked to them before that date, or after that date, Mr. Doherty. I don't remember. I don't remember dates that well, to remember anything like that.

Q. Well, at some time, anyhow, between August, 1944, and September 15, 1944, you determined to bid for Mission Beach; is that right?

A. I should say it might be, yes.

Q. And you knew that Mr. Dailard had made a bid for Mission Beach?

A. No, I hadn't.

Q. Didn't you know that on October 30th, before you had the meeting with the Council? [707]

A. On October 30th I did, but not on September 15th.

Q. Had you examined the bid on October 30th at the time when you went before the Council?

A. No. His bid was read at the Council meeting.

Q. Was it read in full?

A. Yes, I think it was. I think they read it in full, and I know I went down to the Civic Center, oh, a couple of weeks after to reread it again, to see what it said, at the City Clerk's office. It is a matter of record there. I am quite sure it was read in full at that time.

The Court: I think we had better suspend at this time. Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [708]

Los Angeles, California, Tuesday, February 5, 1946.
2:00 p. m.

The Court: All present. Proceed.

LARRY FINLEY,

called as a witness by and in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Resumed)

By Mr. Doherty:

Q. Mr. Finley, in the operation of the jewelery business what part of the business activity did you emphasize as compared with those of Mr. Thorne, your partner, and your respective wives?

A. Primarily promotion and advertising.

Q. Promotion and advertising?

A. That is correct.

Q. And that is what you leaned on most, as it were?

A. Yes.

Q. And was that during the entire approximate three years that you operated that business? A. Yes.

Q. Now I will call your attention to the statement—I should not say “statement”—your bid to the City Council of October the 30th, 1944, and ask if you did not on that occasion make this statement to the City Council, [709] page 5 of Exhibit 8:

“My experience as a business man has been very stable, having successfully operated a chain of retail stores in Southern California.”

Do you remember making that statement?

A. Yes, sir.

Q. And what you were referring to then was your operation of the jewelery business? A. Yes.

(Testimony of Larry Finley)

Q. And your activity in that was by way of promotion and advertising? A. Not solely, Mr. Doherty.

Q. Primarily, though?

A. Primarily, but not solely.

Q. Yes. And does this statement about express your views of yourself in that particular field: "I achieved the reputation of being the outstanding promotion and advertising man in my field in the entire United States"?

A. What was that question, the first part of it, again?

Q. Does that about describe you?

A. My own description, do you mean? Yes.

A. No; it does not. It is not my own description.

Q. You said that in the statement to the City Council, did you not? [710]

A. Yes, I did, but I have been acclaimed that by various trade papers in the jewelry business and by people.

Q. You have been acclaimed that? A. Yes.

Q. And you just merely wrote down here what the acclaim was from the radio and trade papers and other publications? A. Yes; that is right.

Q. In other words, you concluded from reading those articles and hearing them speak of you, that you had "achieved the reputation of being the outstanding promotion and advertising man in my field in the entire United States"?

A. That is what several of the magazines said about me, Mr. Doherty.

Q. Yes. A. Yes, sir.

Q. And what was your field, Mr. Finley?

A. Jewelry. operation, promotion, advertising.

Q. But not in entertainment and amusement?

A. It doesn't state that there.

(Testimony of Larry Finley)

Q. Pardon me?

A. I say, it doesn't state "entertainment" in there.

Q. No. You said, "in my field."

A. That is correct.

Q. And you referred only to the jewelery business?

A. Well, I don't know what is in front of that paragraph that you read, but I imagine it has something to do with [711] the jewelery business.

Q. I will let you read it and see. A. All right.

Pardon me, may I at this time make a correction to my statement of this morning? I neglected to do so when I got on the stand.

Mr. Doherty: Would you mind, your Honor, to let me finish this one, and then he can make a correction after I get through with this particular matter.

Q. I am now directing your attention to your bid to the City Council of October the 30th, 1944, Exhibit 8, page 5. See if I read it correctly:

"My experience as a business man has been very stable, having successfully operated a chain of retail stores in Southern California. I achieved the reputation of being the outstanding promotion and advertising man in my field in the entire United States."

A. How about this up here before that, though, "in the retail business"? I am talking about the retail business there, Mr. Doherty.

Q. Yes.

A. And apparently in the same paragraph.

Q. I will go back to that. What you are referring to about your outstanding reputation as the outstanding man in the United States is the retail business as a jeweler?

[712] A. That is correct.

(Testimony of Larry Finley)

Q. Now, read this sentence, to which you just directed my attention, which immediately precedes the sentence that I read, "In the retail business I operated on a large volume low profit policy, and I am convinced that the same plan can be carried out successfully in the amusement business and at a great advantage to the city and its residents."

A. That is right.

Q. I have made a correct reading of it?

A. Yes. Then you have followed with the statement about in my field.

Q. Oh, yes. There are about 12 or 15 pages in here, Mr. Finley, in which you speak about yourself.

Now, what was it that you misstated this morning, that you said you would like to correct?

A. You asked me whether or not I had made any tax returns from my address on Ridgeway in San Diego. I was under the impression I had not, but my auditor, who was in the court room, said that I did make two tax returns from the Ridgeway address in San Diego.

Q. That would be for the taxable period, 1944?

A. I didn't ask him what returns. He said it was a partnership return and a personal return. It would have been filed in 1945.

Q. I can tell you, Mr. Finley, I am not going to make [713] any point of what you did in that respect.

A. Well, you asked me and I thought I would correct the record.

Q. Well, just leave it out of your memory because I am not going to pursue it any further. A. O.K.

Q. Now, you didn't really intend to operate Mission Beach under a lease at a profit, did you?

A. I certainly did.

(Testimony of Larry Finley)

Q. Well, didn't you wish to operate it more from a civic standpoint than a profit?

A. No, I did not. I did not assert that fact.

Q. You had in mind a profitable enterprise there, did you?

A. A large volume, low profit, yes, sir.

Q. Now, calling your attention again to Exhibit No. 8, being your bid to the City Council, to this particular sentence in it, and follow me and see if I read it correctly, "A great part of my amusement"—

A. Will you talk a little lower?

Q. I don't speak loudly—

A. If you read it, it is all right, Mr. Doherty.

Q. I don't speak loudly, Mr. Finley, to annoy you, but so that that last gentleman in the jury box can hear it. (Continuing): [714]

"A great part of my amusement and entertainment experience has been more civic in nature than as a means of personal profit, and it is from the civic standpoint that I expect to operate the Amusement Center." You said that, didn't you?

A. Yes.

Q. And you wanted the City Council to believe, did you not, that you were going to operate Mission Beach down there as a great civic enterprise, and not one to yield you a profit?

A. That is not so, Mr. Doherty.

Q. That is not so.

A. Definitely.

Q. Pardon me?

A. Definitely not so.

Q. In other words, you went in down there to make money?

A. Yes, I did, and also offer a civic park.

(Testimony of Larry Finley)

Q. You did not mean then what you said to the City Council and the Mayor?

A. I did mean it. I didn't state I was doing it solely as a civic enterprise.

Q. I didn't say, sir, that you did it solely from a civic enterprise but that, "A great part of my amusement and entertainment experience has been more civic in nature than as a means of personal profit," and that is how you [715] expected to operate the Amusement Center?

A. Yes, that was my statement.

Q. Now, when you started to operate down there, did you ascertain the amount of receipts that Mr. Dailard had taken in from the amusement concessions and from the ballroom?

A. Approximately. I couldn't get the exact figures, but I got the approximate figures.

Q. Did you ascertain what he was paying out by way of salaries and overhead and operating expense?

A. I had a rough idea of those figures, yes.

Q. You determined, did you not, that his operation was not a sound one from a business standpoint?

A. That is correct.

Q. And you started out on an entirely new policy?

A. Right.

Q. And you have been operating there on a policy entirely distinct from what he operated during his leasehold?

A. Somewhat distinct from his policy, yes.

Q. Well, yours was for the purpose of attracting great crowds there? A. Correct.

Q. And doing a great amount of advertising?

A. Right.

(Testimony of Larry Finley)

Q. And a great amount of publicity?

A. Right. [716]

Q. And substantial amounts of entertainment?

A. Yes.

Q. Is that right? A. That's right.

Q. And to lower the prices? A. That's right.

Q. And to give the people more for nothing?

A. That is correct.

Q. Your hope was that that policy would yield you ultimately more net profit?

A. At the same time I devised that plan of lower prices, I also devised the plan of an increased revenue to myself, Mr. Doherty.

Q. Well, you hoped, did you not, to make a greater return to yourself in net profit by the policy you were pursuing than you would if you pursued Mr. Dailard's policy of a more conservative policy?

A. That is not exactly right. I can explain it to you if you would like.

Q. Well, is my question not clear?

A. No, it isn't. It wouldn't work that way, Mr. Doherty.

Q. I will withdraw that question. A. All right.

Q. And see if I can't direct one to you that is clear, [717] sir. A. All right, sir.

Q. You did not have before you the amount of the pay roll that Mr. Dailard was paying out each month in connection with his operation?

A. No. I figured about what his pay roll was. It wasn't very much.

(Testimony of Larry Finley)

Q. And the figure of the pay roll you were going to operate under was a much larger pay roll?

A. At the time, yes.

Q. You did not have the figures he was paying for his bands and entertainment out there, did you?

A. Well, I knew that some of the bands went into percentages, and I had a fairly good idea of the general picture, Mr. Doherty, when I went in.

Q. Did you have the figures that he paid out in advertising?

A. No; no, I didn't. I approximated it.

Q. You figured your own budget on advertising?

A. Yes.

Q. And you concluded that your system would ultimately yield more net profit to you?

A. Are you speaking of the ballroom or the beach?

Q. The entire operation.

A. I knew that my system at the beach would result in [718] more profit. As I say, I would like to explain the answer, if I may.

Q. Well, go ahead, Mr. Finley. I will say this, don't go into a long argument, or you and I will disagree. Don't make a speech to me. Make your explanation.

A. This is an explanation. It is not an argument. The concessions at Mission Beach are leased concessions. People lease from me. As far as setting the ceiling on prices, for example, at the hot dog stand the price was reduced to 10 cents. At the same time I didn't take any less revenue from them in rental. On the other hand, the 25-cent milk bottle games that were there last year and paid \$300.00 a month rent dropped their price to 10 cents to the public, but at the same time I increased their rent any-

(Testimony of Larry Finley)

where from fifteen hundred to two thousand dollars in their rental to me. So while there were dropped prices my revenue from the park was much larger than under Dailard's operation.

Q. In other words, you rented the concessions to the concessionaires? A. That's right.

Q. And you charged each concessionaire a flat rental?

A. Some flat and some a percentage.

Q. Flat and a percentage?

A. No, some were flat, and some were on a percentage.

Q. But the percentage was a fixed percentage? [719]

A. That's right.

Q. A fixed percentage— A. Yes.

Q. Of their gross receipts? A. Yes.

Q. And in each instance, or substantially each instance, you raised the concession rents over what they had paid Mr. Dailard?

A. That's right, to take care of our advertising and our increased overhead.

Q. In that respect you had determined that the concessions would yield you more revenue net?

A. That's right.

Q. —than Mr. Dailard was receiving?

A. That's right.

Q. But in the ballroom you had your own ideas about operating that, didn't you? A. Yes.

Q. You had your own policies?

A. I had the policy I was forced to take. It wasn't the policy I wanted.

Q. That is what the City forced you to take?

A. No. How do you mean?

(Testimony of Larry Finley)

Q. Well, didn't you have a contract with the City that you were to operate the concessions and the park in a given way? [720]

A. Yes. That was in my bid, I believe.

Q. And you had a contract that you had to live up to?

A. That's right.

Q. That was not the same contract that Mr. Dailard had for the preceding three years?

A. No, that is correct.

Q. Now, at your Mission Beach Ballroom I read off a long list of bands to your Mr.—I should say "your Mr."—to Mr. Zucca, who was on the stand here, do you remember, the manager of the Meadowbrook down here?

A. Yes.

Q. He is an experienced operator, is he not?

A. Yes.

Q. You have known him for quite a while? I read off to him—

Mr. Christensen: Wait a minute. We haven't got an answer.

The Witness: Did I know Mr. Zucca for quite a while?

Q. By Mr. Doherty: Yes .

A. Yes, six or seven years, I should say.

Q. I read off to him the following list of bands, and asked him if these bands were name bands, and each time I call the band I will give also the date it played at Mission Beach under your management. A. Yes. [721]

(Testimony of Larry Finley)

Q. Henry Busse, February 3rd and 4th—these are all of the year 1945, and if I call off one and the dates are not correct, please stop me.

A. I don't know if I will be able to do that, Mr. Doherty.

Q. Pardon me?

A. I don't know if I can remember 52 dates throughout the year, but I will take your word that you are reading the dates right.

Q. What I am reading from, Mr. Finley, is your answer to Interrogatory No. 18 that is on file here with the Clerk.

A. That is all right.

Q. You remember making an answer to that interrogatory, in which you listed the names of the bands that played at Mission Beach?

A. Yes.

Q. From the time you took it over, until the date of the interrogatory, which was about September 30th, 1945?

A. Yes.

Q. Do you remember making that answer?

A. Yes, I do

Q. Now, I will read it off, and if I am not correct in any instance, you and your counsel can correct me.

Mr. Doherty: Your Honor, it is Interrogatory No. 18. The Witness: May I see it? [722]

The Court: Do you want to look at it?

The Witness: Yes, your Honor, to check the dates.

The Court: Here is the file, Mr. Christensen.

(The document referred to was handed to counsel.) [723]

(Testimony of Larry Finley)

Is it attached to a deposition, or is it one of the interrogatories that were propounded outside?

Mr. Warne: It is one of the interrogatories that was propounded.

Mr. Christensen: It is right here, your Honor.

Mr. Doherty: 18, Mr. Christensen.

Mr. Christensen: Thank you, sir.

The Witness: Yes; I have it here.

Q. By Mr. Doherty: Now, you are looking at your answer to Interrogatory 18, in which you were asked to give the date or dates when bands played at Mission Beach ballroom; and your answer was:

“Henry Busse, February 3rd and 4th; Tiny Hill, February 10th and 11th; Wingy Manone, February 17th and 18th; Sully Mason, February 24th and 25th; Ansil Hill, March 3rd and 4th; Ada Leonard, March the 10th and 11th; Ansil Hill, March 17th and 18th; Shorty Sherock; March 24th and 25th; Carlos Molino, March 31st, April 1st; Ansil Hill, April 7th and 8th; Muzzy Marcellina, April 14th and 15th; Chris Cross, April 21st and 22nd; Ansil Hill, April 28th and 29th; Frankie Carl, May 11th to June 11th;”—that means May 11th to June 11th, the entire month?

A. Four weeks, yes; the four weeks.

Q. “Tony Pastor, June 12th to July 1st; Jimmy Dorsey, July 3rd to July 16th; Tommy Dorsey, July 17th to [724] July 29th; Eddie Miller, July 31st-August 5th; Glen Gray”—

Mr. Christensen: I think you misread that, didn't you, Mr. Doherty? Will you re-read that, please?

(Testimony of Larry Finley)

Mr. Doherty: Which one, Tommy Dorsey?

Mr. Christensen: Eddie Miller, sir.

Mr. Doherty: I will go back.

Q. "Tommy Dorsey, July 17th to July 29th; Eddie Miller, July 31st-August 5th."

That is the way it is written here.

Mr. Christensen: Yes, sir. Thank you.

Q. By Mr. Doherty: "Glen Gray, August 7th to September 2nd; Jinky Tomlin, September 3rd to September 16th; Boyd Raeburn, September 18th to September 30th."

Now, that is a correct list, is it not?

A. Up until that time; yes, sir.

Q. And those were the bands that played at Mission Beach for you from February the 3rd, your opening date, until the date of this interrogatory, which was in the early part of October, I think, of 1945, is that right?

A. Yes; these bands did play.

Q. Now, it was the plan of your operation there, was it not, to only play two nights a week until approximately May 15th? [725]

A. Until May 11th, when Frankie Carl opened.

Q. And then you were to play six nights a week at the Mission Beach ballroom until September 15th?

A. I don't recall the date. It is either September 1st or September 15th.

Q. Yes. And then you were going to go back to either one night a week or two nights a week operation?

A. Two nights a week basis; yes, sir.

(Testimony of Larry Finley)

Q. So it gave you around about four months—rather, let's see; June, July, August, September—about four months of operation, didn't it?

A. About three and one-half months of operation.

Q. About three and one-half months. I note you had the two Dorsey boys there preceding July the 4th and the entire month of July? A. Yes, sir.

Q. From your experience in the entertainment business at a beach operation is that considered a desirable time?

A. Fourth of July is very desirable.

Q. That is the best month of the year, isn't it?

A. Not necessarily. It is as good a month as there is in the year; one of the best months in the year.

Q. Counting the July the 4th holiday, etc., don't you have more people on vacation around beaches during that month than any month in the year? [726]

A. Well, that, again, depends on your attractions that you have, Mr. Doherty. You could have a very bad July with bad bands. If you put the Dorseys in in the month of September, you do business with them. So it is hard to say it would be the best month of the year.

Q. And you may have a very bad operation sometimes when you have a name band in a location, too, might you not? A. Yes; that is very possible.

Q. In fact, you know an instance down in San Diego where there were two name bands playing in Pacific Square at one and the same time, and the boys and girls thought it was so bad they came out to Mission Beach to hear your so-called semi-name band?

A. That is correct.

(Testimony of Larry Finley)

Q. Yes. And the two name bands were Bob Chester and Teagarden?

A. That is right; Jack Teagarden.

Q. And they were both well known name bands, were they not?

A. Well, they were not their own bands that we had down there at that time, Mr. Doherty.

Q. Pardon me?

A. We understand they were bands that the boys just got together up in Los Angeles and took down to San Diego. That is the story we got of it.

Q. You do not know that of your own knowledge, do you? [727]

A. Well, the musicians were talking about it, and it is usually the way we hear those things.

Q. Mr. Finley, you do not know that of your own knowledge, do you? A. Of my own knowledge?

Q. Yes; you do not know whether or not Bob Chester and Jack Teagarden at that particular time had just thrown together a bunch of boys and took them down to San Diego to play at the Pacific Square, do you?

A. Yes; I do.

Q. That they had gotten together a bunch of boys and these men were not their regular performers?

A. I stated that I did, Mr. Doherty.

Q. Of your own personal knowledge? A. Yes.

Q. Did you go around and see the band?

A. No; I did not.

Q. Did you see the members that were playing there at that time?

A. Several of the boys had played there at that time, played for me at the Beach with other orchestras, and

(Testimony of Larry Finley)

they apprised me of the fact that they were down there with Bob Chester and Jack Teagarden. I don't recall exactly who, because at that time I was not so much interested.

Q. Then, you do not know of your own personal knowledge? [728]

A. The boys told me that they played, so I would say I know if of my own personal knowledge.

Q. That is what you call your personal knowledge?

A. Yes.

Q. When you got this lease down at Mission Beach was it written up in the name of yourself and your wife as partners?

A. No; it was written up as myself.

Q. But you and your wife are partners in the Beach operation? A. Yes.

Q. That is, the ballroom and the concessions?

A. Yes.

Q. Have you a regular written articles of copartnership? A. Yes; I do have.

Q. And she has a half interest and you have a half interest? A. That is correct.

Q. And those articles of copartnership have been in effect ever since the Beach operation started?

A. No. It started before that, and the articles of copartnership have been in effect since January or February of 1944.

Q. And are still in effect? A. Yes. [729]

Q. Now, the matter of the Mission Beach operation after you took it over, you have testified here to various efforts on your part to get bands into Mission Beach; and in one of your conversations, part of your testimony,



